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Supreme Court, U.S.
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No. _____

In The Supreme Court Of The United States

MARGARET BRADSHAW, Warden,

Petitioner,

v.

KENNETH T. RICHEY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a federal court hearing a habeas corpus challenge to a state criminal conviction can substitute its own interpretation of state law in the place of the state's highest court on the issue of whether state law allows the use of transferred intent to satisfy the intent element of the criminal offense?

2. Whether, in a federal habeas challenge to a state conviction, AEDPA prevents the federal court from undertaking its own de novo review of an ineffective assistance of trial counsel claim, and from granting a writ based on facts that were not presented to the state courts?

LIST OF PARTIES

The Petitioner is Margaret Bradshaw, the Warden of the Mansfield (Ohio) Correctional Institution.

The Respondent is Kenneth T. Richey, an inmate of the Mansfield (Ohio) Correctional Institution.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

PETITION 1

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

INTRODUCTION 3

STATEMENT OF THE CASE 6

A. Kenneth Richey killed two-year-old Cynthia Collins during his attempt to kill his ex-girlfriend. 6

B. A state court three-judge panel convicted Richey and sentenced him to death. 7

C. Richey litigated his sufficiency-of-the-evidence claim on the merits in state court during direct appeal. 8

Page

D. Richey litigated his ineffective-assistance-of-trial-counsel claim during his post-conviction litigation..... 9

E. The district court rejected Richey's sufficiency-of-the-evidence and ineffective-assistance-of-trial-counsel claims..... 10

F. In a 2-1 decision, the Sixth Circuit reversed the district court and vacated Richey's conviction..... 11

REASONS FOR GRANTING THE PETITION 12

A. The decision below conflicts with the Court's precedent and opinions in four other circuits, which recognize that a federal habeas court cannot reject a state supreme court's determination of a matter of state law..... 13

B. The Sixth Circuit's framework for habeas review of ineffective assistance claims conflicts with the Court's precedents..... 21

CONCLUSION 27

TABLE OF AUTHORITIES

Cases **Page**

Bates v. McCaughtry,
934 F.2d 99 (7th Cir. 1991) 17

Bell v. Cone,
535 U.S. 685 (2002) 22, 23

Blakely v. Washington,
542 U.S. 296 (2004) 17

Bouie v. City of Columbia,
378 U.S. 347 (1964) 17

Davis v. Strack,
270 F.3d 111 (2d Cir. 2001) 16

Eaglin v. Welborn,
57 F.3d 496 (7th Cir. 1995) 15

Einaugler v. Supreme Court,
09 F.3d 836 (2d Cir. 1997) 16

Engle v. Isaac,
456 U.S. 107 (1982) 14

Estelle v. McGuire,
502 U.S. 62 (1991) 14

Fenske v. Thalacker,
60 F.3d 478 (8th Cir. 1995) 16

Gilreath v. Hanks,
1996 U.S. App. Lexis 20340
(7th Cir. Aug. 8, 1996) 4, 15

Page

Gladden v. State,
330 A.2d 176 (Md. 1974) 9

Holland v. Jackson,
124 S. Ct. 2736 (2004) 23, 25

In re Winship,
397 U.S. 358 (1970) 17

Jeffries v. Blodgett,
5 F.3d 1183 (9th Cir. 1992) 17

Mack v. Caspari,
92 F.3d 637 (8th Cir. 1996) 23

Mullaney v. Wilbur,
421 U.S. 684 (1975) 14, 18

Price v. Vincent,
538 U.S. 634 (2004) 23

Pulley v. Harris,
465 U.S. 37 (1984) 14

Rowell v. Dretke,
398 F.3d 370 (5th Cir. 2005) 23

Stanley v. Jones,
973 F.2d 680 (8th Cir. 1992) 17

State v. Mullins,
602 N.E.2d 769 (Ohio Ct. App. 1992) 20

State v. Solomon,
421 N.E.2d 139 (Ohio 1981) 9

Page

State v. Sowell,
530 N.E.2d 1294 (Ohio 1988) 8, 19, 20

Strickland v. Washington,
466 U.S. 668 (1984) ..... *passim*

Wareham v. State,
25 Ohio St. 601 (1874) 9

Williams v. Taylor,
529 U.S. 1362 (2000) ..... 10 ,13, 18, 23

Statutes and Regulations

28 U.S.C. § 1254(1) 2
28 U.S.C. § 2254 ..... 2, 22, 26
Ohio Revised Code § 2903.01 ..... *passim*
Ohio Revised Code § 2929.02 7
Ohio Revised Code § 2929.03 8

PETITION

The Attorney General of Ohio, on behalf of the Warden of the Mansfield Correctional Institution in Mansfield, Ohio, ("Ohio") respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The United States Sixth Circuit Court of Appeals Opinion is reproduced at App. 1a–59a. The order from that court certifying a question of state law to the Ohio Supreme Court is reproduced at App. 220a–33a. The order from the Ohio Supreme Court denying an answer to the certified question is reproduced at App. 234a. The Sixth Circuit's denial of rehearing en banc is reproduced at App. 60a–61a. The United States District Court for the Northern District of Ohio's Memorandum of Opinion and Order is reproduced at App. 62a–220a. The Ohio Supreme Court's opinion on direct appeal is reproduced at App. 235a–71a. The opinions of the Ohio Court of Appeals on direct appeal are reproduced at App. 272a–322a. The Ohio Supreme Court's opinion denying discretionary review of Richey's first post-conviction relief petition is reproduced at App. 335a. The opinion of the Ohio Court of Appeals affirming the denial of Richey's first post-conviction relief petition is reproduced at App. 336a–42a. And the opinion of the Ohio Court of Common Pleas denying Richey's first post-conviction relief petition is reproduced at App. 343a–58a.

JURISDICTIONAL STATEMENT

The United States Court of Appeals issued its opinion on January 25, 2005. The Sixth Circuit denied the Warden's petition for rehearing with a suggestion for rehearing en banc

on April 15, 2005. The Warden timely filed her petition and invokes the Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 2254 of Title 28 of the United States Code provides in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to a judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> (e) (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.
>
> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Ohio Revised Code ("O.R.C.") § 2903.01, Ohio's aggravated murder statute in effect when Richey committed his crime, is reproduced at App. 359a–60a.

INTRODUCTION

The Sixth Circuit Court of Appeals ordered Ohio to release or retry a convicted killer. It did so based on an untenable view of a federal court's role under AEDPA in reviewing state court criminal convictions. One of the bedrock principles of habeas review, even before AEDPA, is that habeas will not lie for alleged errors of state law. Yet the court below simply ignored that principle, granting habeas based on a view of Ohio law that the Ohio Supreme Court had rejected *in an earlier proceeding in this very case.* And in further defiance of the limitations AEDPA imposes, the court below based its review of the state court decision on facts not included in the state court record. The dramatic expansion of federal court power reflected in the decision

below conflicts with both common sense and the common understanding among the circuits regarding AEDPA's reach, and threatens to undermine, if not eviscerate, the federalism and comity notions that animate that statute.

While the court below granted relief on two separate grounds, each relies on a deeply flawed understanding of AEDPA's analytical framework. First, and most important, the decision below creates a direct conflict among the circuits regarding the extent of a federal habeas court's power to define the elements of a state crime. One of the fixed stars of habeas jurisprudence is that federal courts may not grant habeas relief based on alleged state court errors of state law. Before the decision below, the circuits had uniformly understood that to mean that, except in extraordinary circumstances clearly not present here, habeas petitioners could not challenge state court determinations regarding either what constituted the necessary elements for a state crime or what legal theories the state could rely on in meeting those elements. In an example of particular significance here, the Seventh Circuit held that where the state supreme court has endorsed the use of "transferred intent" to meet the intent element of a crime, that determination is binding on federal habeas courts. See *Gilreath v. Hanks*, 1996 U.S. App. Lexis 20340, at *6 (7th Cir. Aug. 8, 1996).

The decision below, however, marks a radical departure from this previously-uniform understanding among the circuits, starkly contrasting with decisions like the Seventh Circuit's *Gilreath* decision. Here, the Ohio Supreme Court ruled *during Richey's own direct appeal* that Ohio law allows the use of transferred intent to meet the intent element of murder: "The doctrine of transferred intent is firmly rooted in Ohio law." App. 250a (quotation marks omitted). The Sixth Circuit, however, based its grant of habeas relief on its own contrary view of Ohio law: "[W]e must find that the State could not apply transferred intent in order to satisfy the

specific intent requirement in an aggravated felony murder case." App. 30a. In reaching that result, as the dissent below noted, the panel majority "essentially eviscerated the power of the Ohio Supreme Court to interpret its own statutes." *Id.* at 52a.

The lower court's willingness to grant habeas relief based on its own redetermination of state law issues irreconcilably conflicts both with the habeas principles articulated by this Court, and with the holdings of the other circuits. Moreover, it dramatically, and improperly, increases the scope of federal court involvement in state criminal law issues. Either of these factors alone warrants certiorari, or perhaps even summary reversal; together the need for review and correction is stark.

Second, the panel's ineffective-assistance-of-counsel analysis directly conflicts with AEDPA's analytical framework and the Court's decisions applying that framework in two distinct ways. First, the court below failed to recognize that federal courts presented with an ineffective assistance claim in habeas cannot simply undertake their own independent analysis under *Strickland v. Washington*, 466 U.S. 668 (1984). Rather, the *only* question is whether the state court applied *Strickland* in an "objectively unreasonable manner." And, second, in making that determination, the federal court must look only to the factual record before the state court at the time it decided. Here the panel ignored each of these limitations. It did not even attempt to parse the state court's analysis and apply the required standard. Rather the panel essentially treated the claim as if it were on direct review, rather than habeas, and conducted its own independent *Strickland* analysis. Indeed, the only passing nod it made to AEDPA was when, after having independently concluded that a *Strickland* violation occurred, the panel inserted a single sentence in two places in its opinion that "the state court's conclusion to the contrary was unreasonable." App. 45a, 61a. And even that nod was an

afterthought at best—the court added one of the two to the opinion only after Ohio filed for rehearing on the original decision. Moreover, in finding a *Strickland* violation, it expressly relied on facts that had not been presented to the state courts.

In sum, the panel improperly collapsed the standards for direct review and habeas review of ineffective assistance claims. As virtually every habeas petition includes at least one claim of ineffective assistance, this newly-minted approach to such claims portends potentially disastrous consequences for the finality of state criminal convictions, thereby undermining the important federalism notions that habeas generally, and AEDPA in particular, are designed to protect.

The lower court's analysis on each of these issues was so deeply flawed that Ohio respectfully suggests that summary reversal may be warranted. In the alternative, Ohio urges the Court to accept review to prevent this flawed framework from further permeating habeas jurisprudence.

STATEMENT OF THE CASE

A. Kenneth Richey killed two-year-old Cynthia Collins during his attempt to kill his ex-girlfriend.

In 1987, an Ohio court convicted Kenneth Richey of aggravated murder. The court determined that he killed two-year-old Cynthia Collins by setting ablaze the apartment where she lay sleeping, and that he did so in an attempt to kill his ex-girlfriend and her new boyfriend who were asleep in the apartment below.

The fire in the Collins's apartment began at about 4:15 a.m. on June 30, 1986. At the time, Richey was the only person there other than two-year-old Cynthia, who was asleep in a bedroom. Cynthia's mother had left with a friend when Richey agreed to watch Cynthia.

Based on their investigation of the blaze, the police determined that Richey started the fire, and that he did so in order to kill either his ex-girlfriend, her new lover, or both. The burn patterns showed that an accelerant had been used in the Collins's apartment to start the fire. And multiple witnesses from a party at the apartment complex that Richey had attended earlier that evening told police that Richey had expressly threatened to burn the building down.

According to these witnesses, Richey was very upset that his ex-girlfriend was at the party with a new boyfriend. One witness related that Richey said "If I can't have her [referring to Richey's ex-girlfriend], nobody else can." App. 236a. Three others testified that Richey said he would burn down the "A Building"—the building in the complex in which his girlfriend lived. According to one, Richey said "Before the night is over, part of A Building is going to burn down." *Id.* at 237a.

While watching firefighters fight the blaze, Richey confirmed his role in the fire. He asked his former girlfriend, who had also fled to the parking lot outside, if the fire had scared her. When she said yes, Richey told her "if he couldn't have [her], that nobody would." *Id.* at 238a. Another witness also testified that as Richey stood casually drinking a can of beer and watching the flames, he laughed and said "It looks like I did a helluva good job, don't it." *Id.*

B. A state court three-judge panel convicted Richey and sentenced him to death.

Based on this evidence, a grand jury indicted Richey for aggravated murder. The indictment specified that Richey had committed the aggravated murder in the course of committing arson—a capital offense under Ohio law. See O.R.C. §§ 2903.01 & 2929.02. The indictment further charged Richey with aggravated arson, breaking and entering, involuntary manslaughter, and child endangering.

Richey waived his right to a jury trial, and the trial proceeded before a three-judge panel. (Ohio law requires three-judge panels for bench trials involving a capital charge. See O.R.C. § 2929.03(C)(2)(b).) Richey did not testify at trial, but his attorneys argued that that there was insufficient evidence linking Richey to the fire. At the end of the trial, however, the three-judge panel unanimously convicted him on all counts of the indictment (except the manslaughter count that was a separately-charged lesser included offense to the felony murder count). After a separate sentencing hearing at which Richey presented mitigation evidence, the panel unanimously imposed the death penalty.

C. Richey litigated his sufficiency-of-the-evidence claim on the merits in state court during direct appeal.

The Ohio Supreme Court affirmed Richey's conviction on direct appeal. While Richey advanced some twenty-three claims of error, he did not argue that Ohio law did not allow "transferred intent" in felony murder cases. That is, Richey did not directly raise the issue on which the court below relied in granting him habeas relief. The Ohio Supreme Court did, however, rule on the issue of transferred intent in the course of rejecting Richey's claim that the evidence at trial was insufficient to support his conviction.

In particular, the court expressly found that transferred intent was "firmly rooted in Ohio law." According to the court, it was immaterial that Richey had intended to kill his ex-girlfriend, rather than two-year-old Cynthia, who actually died in the blaze:

> The fact that the intended victims escaped harm, and that an innocent child, Cynthia Collins, was killed instead, does not alter Richey's legal and moral responsibility. "The doctrine of transferred intent is firmly rooted in Ohio law." *State v. Sowell* (1988), 39 Ohio St.3d 322, 332. Very simply, "the culpability of a scheme designed to

> implement the calculated decision to kill is not altered by the fact that the scheme is directed at someone other than the actual victim." *State v. Solomon* (1981), 66 Ohio St.2d 214, 218.

App. 250a. Indeed, as the court also noted, the use of transferred intent in Ohio criminal law went back over a century. See *id.* at 251a (citing *Wareham v. State*, 25 Ohio St. 601, 607 (1874)). And further solidifying this conclusion, the court noted the "singular unanimity" among the States on the question of whether transferred intent would suffice to support a murder conviction. *Id.* at 251a (quoting *Gladden v. State*, 330 A.2d 176, 181 (Md. 1974)).

Finding that the evidence of Richey's guilt was overwhelming, the court rejected all of Richey's challenges to his conviction. The court then separately addressed, and rejected, Richey's challenges to his death sentence. As the court noted, "Richey killed a defenseless child, whose safety had been entrusted to him, as a result of a blind, jealous rage directed at his ex-girlfriend and her current lover." App. 262a. Accordingly, it concluded "[t]he death penalty is appropriate and proportionate when compared with similar felony murder cases." *Id.* at 263a.

D. Richey litigated his ineffective-assistance-of-trial-counsel claim during his post-conviction litigation.

Richey then filed a state post-conviction petition that raised several claims of ineffective assistance of trial counsel. The trial judge rejected those claims. Of particular importance here, the claims included a claim that Richey's attorney provided ineffective assistance with regard to his handling of the fire expert he retained to help prepare Richey's defense. In rejecting that claim, the state court expressly found (1) that Richey had not argued that his expert was unqualified, (2) that in any event Richey's expert was qualified, and (3) that Richey's trial counsel acted reasonably in relying on the expert. *Id.* at 347a–49a. Richey appealed,

and Ohio's Third Appellate District affirmed the trial court's rejection of the claims. Richey further appealed to the Ohio Supreme Court, which declined to accept the case for discretionary review.

E. The district court rejected Richey's sufficiency-of-the-evidence and ineffective-assistance-of-trial-counsel claims.

Richey then filed a habeas petition in the Northern District of Ohio advancing twenty-seven grounds for relief. The district court rejected the petition, and, in doing so, specifically considered, and rejected, the two grounds on which the Sixth Circuit relied below in vacating Richey's conviction. In rejecting the first of the two—the insufficiency-of-evidence claim—the district court found that Richey's claim was procedurally defaulted because he failed to raise it at trial or on direct appeal. *Id.* at 129a–32a; 150a–52a (specifically barring the transferred intent argument). The court also held that Richey's claim was based on a point of purely state law—namely, whether Ohio law permitted application of the transferred intent doctrine in a case of felony aggravated murder—which was not cognizable in a habeas corpus proceeding. *Id.* at 131a. Finally, the court concluded that even if Richey had preserved a cognizable claim for review, it lacked merit because "Richey cannot argue persuasively that Ohio has abandoned the transferred intent theory when the Ohio Supreme Court explicitly stated in his case that it has not." *Id.* at 132a.

The court likewise rejected the ineffective assistance claim. The court found that while defense counsel's failure to investigate can constitute ineffective assistance of counsel, *id.* at 193a–94a (citing *Williams v. Taylor*, 529 U.S. 1362 (2000)), "no court has determined that once counsel undertakes an adequate investigation, any disfavorable results constitutionally require further investigation," *id.* at 194a. The court concluded that "counsel's conduct in hiring

DuBois and accepting his report was not objectively unreasonable." *Id.*

F. In a 2-1 decision, the Sixth Circuit reversed the district court and vacated Richey's conviction.

In a 2-1 decision, the Sixth Circuit reversed the district court decision and granted Richey habeas relief, vacating his aggravated murder conviction. The court relied on two separate grounds to reach this result.

First, the panel majority rejected the Ohio Supreme Court's reading of Ohio law as to whether the State could rely on transferred intent to satisfy the intent element of aggravated murder under O.R.C. § 2903.01(B). While recognizing that the Ohio Supreme Court opinion had expressly said that the State *could* do so, the panel said that in habeas the State could not simply "rel[y] on the Ohio Supreme Court's pronouncement in Richey's case to support its interpretation of what elements [the State] needed to prove."[1] App. 26a.

The panel majority instead undertook its *own* analysis of Ohio law and determined that transferred intent was *not*

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[1] The Sixth Circuit seemed to recognize that this was a question of state law. After oral argument, a divided court issued an order certifying a question regarding transferred intent to the Ohio Supreme Court. The majority declared that it was "uncertain as to how Ohio defined the intent element of aggravated felony murder at the time of the offense." App. 220a. So the majority certified the following question: "As provided by O.R.C. § 2903.01 in June 1986, is intent to cause the death of someone other than the actual victim sufficient to establish the requisite intent for aggravated felony murder?" *Id.* at 230a. Judge Siler dissented from the Certification Order because he was "of the firm opinion that the Ohio Supreme Court has already spoken on the issue to be certified." *Id.* at 233a. Judge Siler correctly predicted that the Ohio Supreme Court would decline to answer the question as it had already answered it during Richey's direct appeal. *Id.* at 232a. ("I can see no reason for the Ohio Supreme Court to answer our question. As the majority opinion correctly states, on direct appeal that court already decided the certified issue.").

available. In doing so, it looked to the very cases that the Ohio Supreme Court had relied on during Richey's direct appeal in determining that transferred intent *was* available. But, contrary to the Ohio court, the panel majority held that those cases were limited to aggravated murder under O.R.C. § 2903.01(A), and did not apply to aggravated murder under O.R.C. § 2903.01(B), the crime with which Richey was charged. For the latter crime, the court said, transferred intent was not enough.

Having determined that transferred intent was not an available legal theory, the panel majority concluded that there was insufficient evidence to support Richey's murder conviction. In particular, the State's evidence showed that Richey intended to kill his girlfriend (who did not die), not two-year-old Cynthia (who did). Thus, the majority concluded, the State had failed to establish a necessary element of the crime under state law, rendering Richey's conviction constitutionally defective.

Second, the panel held that Richey had received ineffective assistance of trial counsel. Although Richey extensively litigated that claim in state court, the panel did not review the state court analysis. Rather, it undertook an independent, de novo assessment under *Strickland*, and determined that both *Strickland* elements—deficient performance and prejudice—were present. The panel's sole mention of the state court's contrary determination on the ineffective assistance issue consisted of one sentence—"The state court's conclusion to the contrary was unreasonable"—that it placed at the end of its analysis of each prong. Even that sentence was an afterthought, as the majority added the sentence to its prejudice analysis only after Ohio sought rehearing en banc. See App. 61a ("The panel has added the sentence 'The state court's conclusion to [the] contrary is unreasonable' to the paragraph before Part III. Conclusion on page 22 of the opinion.") (order denying rehearing en banc).

Judge Siler vigorously dissented on both holdings. With regard to the first, he opined that the Ohio Supreme Court's determination of the necessary elements of aggravated murder foreclosed the panel's redetermination of that issue. As he noted, by ruling otherwise, the majority "essentially eviscerated the power of the Ohio Supreme Court to interpret its own statutes." *Id.* at 52a. And with regard to the ineffective assistance issue, he noted that, in undertaking a de novo *Strickland* analysis, the majority exceeded the federal court's proper role under AEDPA. Rather, he said, the federal court should have been limited to deciding whether or not the state court's Strickland analysis was "objectively unreasonable." *Id.* at 54a (citing *Williams*, 529 U.S. at 409). Under the proper AEDPA framework, the judge concluded, habeas relief was not warranted on the record here.

Because the majority's opinion on these issues creates important conflicts both with this Court's precedent, and with law from the other circuits, regarding the appropriate scope of federal court review of state criminal convictions under AEDPA, the Warden now respectfully requests certiorari review.

REASONS FOR GRANTING THE PETITION

A. The decision below conflicts with the Court's precedent and opinions in four other circuits, which recognize that a federal habeas court cannot reject a state supreme court's determination of a matter of state law.

The court below rejected the Ohio Supreme Court's determination regarding the elements of aggravated murder under Ohio law. In doing so, the opinion creates a sharp break both with authority from this Court and the uniform opinion of four other circuits regarding the extent to which federal courts can rest habeas relief on alleged errors in state law. Indeed, as described below, the decision here so clearly

conflicts with settled law that summary reversal may well be appropriate.

1. The Court itself has "stated many times that federal habeas corpus relief does not lie for errors of state law." *Estelle v. McGuire*, 502 U.S. 62, 67 (1991) (quotation marks omitted); see also *Pulley v. Harris*, 465 U.S. 37, 41 (1984) ("A federal court may not issue the writ on the basis of a perceived error of state law."). And in doing so, the Court has "reemphasize[d] that it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Estelle*, 502 U.S. at 67–68. Indeed, the Court has expressly rejected the argument that "the [state supreme court's] construction of state law should not be deemed binding on [the] Court" in habeas actions. *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). "[S]tate courts," the Court said, "are the ultimate expositors of state law, and [federal courts] are bound by their constructions." *Id.* (citation omitted).

The Court's case law strongly suggests that determining the elements of a state law crime is one such issue of state law. In *Engle v. Isaac*, 456 U.S. 107, 119 (1982), the habeas petitioners argued that Ohio had "implicitly designated absence of self-defense an element of the crimes charged against them," and that the State should thus have been required to prove "absence of self-defense" beyond a reasonable doubt. The Court rejected that claim, finding that it sounded only in state law, and thus could not provide the basis for habeas relief: "While they attempt to cast their first claim in constitutional terms, we believe that this claim does no more than suggest that the instructions at respondents' trials may have violated state law." *Id.* at 120–21. In short, state law determines what the elements of a crime are, and federal courts lack the power to adjudicate such questions in habeas.

2. The circuit courts, other than the one below, have clearly understood the Court's jurisprudence in that regard. The circuit courts to consider the issue have uniformly concluded that state law defines the elements of a crime, and that the power to define the elements includes defining what legal theories the State can rely on in proving that those elements exist.

The Seventh Circuit's decision is *Gilreath v. Hanks*, 1996 U.S. App. Lexis 20340 (7th Cir. Aug. 8, 1996), perhaps demonstrates most clearly the conflict between these other circuits and the decision below. There, the court rejected a habeas claim identical to the one that the court below approved. In *Gilreath*, the petitioner claimed "that Indiana has abolished the doctrine of transferred intent and therefore could not use it in his case." *Id.* at *4. This, the court correctly noted, "is actually a claim that under Indiana law in order to show that a defendant is guilty of murder, the state must prove that the defendant actually killed the person whom he intended to kill." *Id.* at *4–*5. And the Seventh Circuit concluded, unlike the court below, that the state supreme court's opinion on that issue was the final word: "Whether or not we would read the Indiana statute differently is not relevant, for we have no authority to tell the Indiana Supreme Court how to construe Indiana statutes . . . . The Indiana Supreme Court recognizes the doctrine of transferred intent and therefore Gilreath's first claim fails." *Id.* at *6. (citation and quotation marks omitted).

While *Gilreath* is an unreported decision, it undoubtedly represents the Seventh Circuit's view on this issue. As the en banc Seventh Circuit court noted in *Eaglin v. Welborn*, 57 F.3d 496, 501 (7th Cir. 1995), "[a] state is free within extremely broad limits to decide upon the elements of a crime." And state law questions, the en banc court noted, even if wrongly decided, cannot provide the basis for habeas relief: "[I]f there is one fixed star in the confusing jurisprudence of constitutional criminal procedure, it is that a

violation of state law does not violate the Constitution." *Id.* Unfortunately, as described below, that "fixed star" no longer shines in the Sixth Circuit.

The Second Circuit's decision in *Einaugler v. Supreme Court*, 109 F.3d 836 (2d Cir. 1997), further reflects the conflict. There, like here, the petitioner sought relief on sufficiency-of-evidence grounds. He claimed that the State could not convict him without direct expert testimony (he was convicted of reckless endangerment for his conduct as a physician). The court, however, concluded that it "would go far beyond the proper role of this court in considering a writ of habeas corpus to determine that" New York law had a requirement of direct expert testimony for conviction on his charges. *Id.* at 842. According to the court, "[t]o do so would be to use the federal constitution to micromanage the laws of New York State." *Id.*

Moreover, the circuits have repeatedly recognized that a state supreme court's determination of the elements of a state crime is binding on federal courts in habeas. In *Fenske v. Thalacker*, 60 F.3d 478, 480 (8th Cir. 1995), for example, the petitioner challenged his burglary conviction on the grounds that "the evidence at trial was insufficient to establish every essential element of burglary under Iowa law." In rejecting that claim, the court began from the proposition that "[i]t is elementary that state law defines the elements of state-law crimes." *Id.* "It is the task of the [state supreme court], not [the federal court of appeals] to determine and define the scope of the [state] burglary statute." *Id.* And, as the state supreme court had "found that [the petitioner's] conduct fit within the Iowa burglary statute"—just like the Ohio Supreme Court did in Richey's case here—the circuit court said it was "not prepared to give the statute a meaning rejected by that court, as [the petitioner] would have [the court] do." *Id.* at 481.

Other courts agree. See *Davis v. Strack*, 270 F.3d 111, 123 (2d Cir. 2001) ("States are free to define the elements of, and defenses to, crimes."); *id.* at 123 n.4 ("In determining whether a petitioner was entitled to a defense under state law, federal courts must of course defer to state-court interpretations of the state's laws, so long as those interpretations are themselves constitutional."); *Bates v. McCaughtry*, 934 F.2d 99, 102 (7th Cir. 1991) ("A claim that the state court misunderstood the substantive requirements of state law does not raise a claim under § 2254."), *cert. denied*, 502 U.S. 915 (1991); *Stanley v. Jones*, 973 F.2d 680, 682 (8th Cir. 1992) (federal courts should not offer a second opinion on interpretation of state law where the petitioner argued that the state court misinterpreted the elements of the crime), *cert. denied*, 507 U.S. 962 (1993); *Jeffries v. Blodgett*, 5 F.3d 1183, 1194 (9th Cir. 1992) (rejecting claim that the state failed to prove the elements of an aggravating circumstance and deferring to the Washington Supreme Court's interpretation of the elements of the aggravating circumstance). In short, the uniform view as expressed in opinions from the Second, Seventh, Eighth, and Ninth Circuits is that questions regarding how state-law crimes are defined are questions of *state* law, and thus are not a proper basis for habeas relief.

That is not to say that federal habeas courts play no role in these issues. Although determining the elements of a crime is a matter of state law, the federal Constitution places some limits. It requires, for example, proof beyond a reasonable doubt for each element established by state law, see *In re Winship*, 397 U.S. 358 (1970), and mandates jury trial rights for each of them as well, see *Blakely v. Washington*, 542 U.S. 296 (2004). The State's failure to meet either of these requirements would entitle a petitioner to habeas relief. Similarly, a state court's determination of the elements could potentially be so novel or unexpected that it would violate a defendant's due process rights. See, e.g., *Bouie v. City of*

Columbia, 378 U.S. 347, 249–50 (1964). But the important point here is that a habeas petitioner cannot base his claim for relief on the argument that the state courts were wrong *as a matter of state law* as to what elements are required.

3. The decision below cannot be reconciled with the principles articulated above. Here, the Ohio Supreme Court, during Richey's own direct appeal, determined that the doctrine of transferred intent applied: "The fact that the intended victims escaped harm, and that an innocent child, Cynthia Collins, was killed instead, does not alter Richey's legal and moral responsibility." App. 250a. Indeed, the court noted, transferred intent is "firmly rooted" in Ohio law with a historical pedigree extending over 100 years. See *id.* at 250a–51a (citing *Wareham v. State*, 25 Ohio St. 601, 607 (1874) (explaining why transferred intent is an important component of Ohio criminal law)).

Yet, the panel below reached a directly contrary conclusion on the availability of transferred intent—"we must find that the State could not apply transferred intent in order to satisfy the specific intent requirement in an aggravated felony murder case." App. 30a. It reached that result by relying on two state court cases that post-date Richey's conviction—cases that themselves *upheld* murder convictions based on transferred intent—along with its own independent reading of Ohio's aggravated murder statute. In so doing, as the dissent noted, the majority "essentially eviscerated the power of the Ohio Supreme Court to interpret its own statutes." *Id.* at 52a. That result is hardly consistent with AEDPA's command of deference, and would not fly even under pre-AEDPA habeas analysis. *Mullaney*, 421 U.S. at 691 ("This Court . . . repeatedly has held that state courts are the ultimate expositors of state law . . . and that we are bound by their constructions except in extreme circumstances not present here. Accordingly, we accept as binding the [state supreme court's] construction of state homicide law.").

Moreover, as noted above, it creates a sharp conflict with other circuits' handling of this issue.

To be sure, the court tried to buttress its holding by suggesting that the use of transferred intent to support a felony murder conviction under Ohio law would be so novel as to violate due process. See App. 27a–28a (citing *Bouie*, 378 U.S. at 351). But that suggestion does nothing to vitiate the conflict that the decision below creates. This is so for two reasons. First, while the court suggested the *possibility* that allowing transferred intent would be so novel as to create a due process problem, its actual *holding* was that state law rejects the use of transferred intent. That is, the court did not use the "novel interpretation theory" as a basis for granting habeas relief on due process grounds. Rather, it used that theory as an interpretive tool to support its reinterpretation of Ohio law. Essentially, the court said that "the Ohio Supreme Court must not have really meant what it said about transferred intent because, if it had, that interpretation would have violated due process." Thus, at the end of the day, the actual basis for the majority's decision rested on its reinterpretation of Ohio law. Certainly that is how the dissent understood it. See App. 52a (recognizing that the majority had "essentially eviscerated" the power of Ohio courts to decide matters of Ohio law). But in granting relief on those grounds, the court below claimed a power that a host of other circuits have correctly concluded federal courts do not have—the power to overrule the state supreme court regarding what elements the State requires for murder.

Second, the "novel interpretation theory" cannot serve as a viable alternative explanation for the simple reason that it fails to justify the grant of habeas relief. This Court has said that the threshold for unconstitutional "novelty" is very high indeed, see *Mullaney*, *supra*, and that threshold is not met here. As discussed above, the Ohio Supreme Court showed that the doctrine is "firmly rooted" in Ohio law, citing cases going back over 100 years. Thus, it is hardly

surprising that this "firmly rooted" doctrine would apply to felony-murder cases. The two Ohio cases that the court below relied on do not suggest otherwise. The principal case, *State v. Sowell*, 530 N.E.2d 1294 (Ohio 1988), involved a murder conviction under O.R.C. § 2903.01(A), not O.R.C. § 2903.01(B) as in Richey's case. And the court there *upheld* a conviction based on transferred intent. There is nothing in that opinion inconsistent with the use of transferred intent in Richey's case, as evidenced by the fact that the Ohio Supreme Court cited *Sowell* in upholding Richey's conviction. App. 250a. The other case, *State v. Mullins*, 602 N.E.2d 769 (Ohio Ct. App. 1992), is an intermediate appellate court case, hardly the final word on Ohio law, especially when the Ohio Supreme Court has spoken otherwise. And again, its holding was directed to a murder conviction under O.R.C. § 2903.01(A), a conviction it upheld. *Id.* at 772. While the *Mullins* court suggested in dicta that the legislature had *apparently* removed the transferred intent doctrine from aggravated felony murders by enacting O.R.C. § 2903.01(D) (a statutory section dealing with when intent to kill can be inferred from conduct), that point was irrelevant to the court's holding. In any event, the appellate court dicta in a case involving a different crime certainly cannot be a sufficient basis, in and of itself, to show the Ohio Supreme Court's determination in Richey's case was unconstitutionally novel.

The Ohio Supreme Court unequivocally stated that the transferred intent doctrine applied to Richey's offense, and no Ohio court has ever held to the contrary. Thus, even if the court had actually relied on the "novel interpretation theory" as an alternate holding (and it did not), it would still fail to cure the conflict the decision below creates.

The end result is that the panel majority has created a new power for federal courts in habeas—the power to trump state courts *on questions of state law* concerning the elements of the crime. In adopting that approach, the court below has

directly undermined the federalism principles that animate habeas in general and AEDPA in particular. In fact, the approach below so clearly contradicts the principles articulated in *Engle*, *Mullaney* and *Estelle* that Ohio respectfully suggests that summary reversal may be appropriate. At the very least, given the direct conflict between the decision below and the uniform view of circuits across the country, certiorari is warranted. Only this Court can restore the appropriate balance between federal and state courts with regard to state criminal convictions. Ohio urges the Court to do so.

B. The Sixth Circuit's framework for habeas review of ineffective assistance claims conflicts with the Court's precedents.

The alternate basis for the lower court's grant of habeas relief—the claim that Richey received ineffective assistance—further demonstrates the need for review and correction. In fact, the lower court's analysis directly conflicts, in two distinct ways, with this Court's mandates on how to review ineffective assistance claims under AEDPA.

1. First, as the Court has noted, AEDPA's language limits the scope of habeas relief to those occasions where a state court's decision is either "contrary to," or an "unreasonable application of," Supreme Court precedent. And this Court has properly insisted that lower courts abide by this language. The starting point for habeas review, then, must be the state court decision. Federal courts in habeas are not free to independently analyze the claimed error, but rather only to determine whether the state court's analysis violated the applicable standards. The Sixth Circuit's decision here fails to comport with that limitation.

No one disputes that *Strickland* supplies the correct substantive standard for assessing ineffective assistance claims. And the Ohio courts expressly relied on *Strickland* in rejecting the ineffective assistance claims Richey advanced

during his post-conviction proceedings. See, e.g., App. 350a (citing circuit court and state appellate court cases applying *Strickland* to claims of ineffective assistance based on alleged deficiencies in an attorney's interaction with experts). On habeas, then, the court should have limited its reach to determining whether the state court determination on that issue violated the "unreasonable application" prong of 28 U.S.C. § 2254(d)(1). See *Bell v. Cone*, 535 U.S. 685, 698–99 (2002).

Rather than start with the state court decision, though, the panel's analysis began as though this were an ineffective assistance claim on direct appeal, rather than on habeas: "As previously noted, *Strickland* requires that Richey demonstrate both deficient performance and resulting prejudice." App. 39a. The majority then undertook its own independent analysis and found deficient performance and prejudice, again with no reference to the state court's handling of those issues. It concluded that analysis with a perfect summary of its *Strickland* result:

> Accordingly, we find that counsel's incompetent handling of the sole forensic expert in this case fell below the wide range of acceptable professional standards, and that absent counsel's grave mistakes, there is a reasonable probability that the three-judge panel would have at least had a reasonable doubt as to whether Richey set the fire that ultimately caused the death of Cynthia Collins.

Id. at 50a. In short, the court's analysis was indistinguishable from the analysis that would have applied on direct review.

This Court, however, recently reversed a lower court for using that kind of analysis on habeas:

> For Respondent to succeed, however, he must do more than show that he would have

> satisfied *Strickland*'s test if his claim were being analyzed in the first instance, because under §2254(d)(1), it is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied *Strickland* incorrectly. Rather, he must show that the Tennessee Court of Appeals applied *Strickland* to the facts of his case in an objectively unreasonable manner.

Cone, 535 U.S. at 699 (citation omitted); see also *Price v. Vincent*, 538 U.S. 634, 639 (2004) (reversing the Sixth Circuit for reciting the AEDPA standard but then "proceed[ing] to evaluate respondent's claim *de novo* rather than through the lens of §2254(d)"); *Holland v. Jackson*, 124 S. Ct. 2736 (2004); *Williams v. Taylor*, 529 U.S. 362 (2000).

That is exactly the mistake the panel made here. As the dissent below noted, the Sixth Circuit should have been asking only whether the state court had applied *Strickland* in an unreasonable manner, but it failed to limit itself in that way. See App. 54a–55a (citing two recent Supreme Court AEDPA cases on ineffective assistance of trial counsel and noting that the inquiry is whether the Ohio courts unreasonably applied *Strickland*). In fact, somewhat ironically, the *only* place where the panel even discussed the Ohio state court's decision was in the panel's consideration of whether the ineffective assistance claim was procedurally defaulted. And even there, it cited the state court opinion only to reject the state court's reading of state law on whether Richey should have raised his claims on direct appeal rather than in state postconviction proceedings.[2] *Id.* at 38a–39a.

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[2] This is yet more evidence of the Sixth Circuit's failure to comply with AEDPA. State court interpretations of state procedural rules are binding on federal courts in habeas. See, e.g., *Rowell v. Dretke*, 398 F.3d 370, 374–75 (5th Cir. 2005) ("[The habeas petitioner] at essence is arguing that the state court incorrectly interpreted Texas procedural law by finding he defaulted his claim; it is not the role of the federal habeas court

Tellingly, the majority below itself appears to have recognized that it failed to follow AEDPA. In a belated attempt to bring its analysis within AEDPA's scope, the majority responded to Ohio's request for rehearing en banc by modifying its conclusion on the prejudice prong of the ineffective assistance claim (quoted above) by adding one sentence: "The state court's conclusion to [the] contrary was unreasonable." App. 61a. But the belated addition of this language, if anything, further demonstrates that the majority in fact conducted its own *independent* analysis. Merely tacking a passing reference to AEDPA on the tail of that analysis does not magically transform that prohibited "independent judgment," into an AEDPA-compliant review.

2. Second, in determining whether the state court "unreasonably applied" *Strickland*, the court below also violated AEDPA's requirements regarding the treatment of facts. First, the court here made virtually the same mistake that led the Court to summarily reverse the Sixth Circuit in *Holland v. Jackson*, 124 S. Ct. 2736 (2004). There, the Sixth Circuit found "unreasonable application" based on facts that had not been before the state court, but had instead been developed for the first time in federal habeas. In reversing the grant of a writ, the Court unequivocally stated that in determining "unreasonable application," the state court's decision "must be assessed in light of the record the court

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to reexamine state-court determinations of state-law questions."); *Mack v. Caspari*, 92 F.3d 637, 640 (8th Cir. 1996) (challenges to state court's application of state procedural rules are not cognizable in habeas). Here, however, the Sixth Circuit rejected the state court's view that Richey's ineffective assistance claims were procedurally barred as a result of his failure to raise them on direct appeal. The only proper inquiry in habeas should have been whether the state procedural rule *as applied by the state court* served as an adequate and independent state law ground. That is, the court should have focused on whether the state court's interpretation of the procedural rules was firmly established and regularly followed. Instead, the court simply undertook its own de novo reinterpretation of Ohio's procedural law. This was a clear violation of AEDPA's mandates.

had before it." *Id.* at 2737–38. That is, a federal court cannot rely on facts not presented to the state court as a basis for determining that the state court acted unreasonably.

But here, as in *Holland*, the court relied on new facts. The first factor the court cited as a basis for finding deficient performance was that Dubois (the expert counsel hired) was "unqualified for the job." App. 41a. But virtually every fact that the court cited in support of that was developed for the first time during habeas. For example, it was depositions taken in the habeas proceeding that revealed (1) that DuBois worked primarily in another field, (2) that DuBois had worked under the State Fire Marshal and thought very highly of him, (3) that trial counsel "waited two months after he was retained . . . to contact and meet DuBois," *id.* at 41a, and (4) that counsel "limited DuBois's initial investigation to ten hours," *id.* Indeed, in the state court proceedings, Richey affirmatively chose *not* to challenge DuBois's qualifications. Instead, he challenged only the results that DuBois had reached. See *id.* at 350a ("Richey does not allege that Mr. DuBois was not qualified to render an expert opinion."). And none of the information that the Sixth Circuit cited regarding those qualifications was in the record before the state courts. Accordingly, the Sixth Circuit committed clear error in even considering that information as part of assessing whether the state court "unreasonably applied" *Strickland*. See *Holland*, 124 S. Ct. at 2737–38.

This failure is perhaps even more glaring with regard to another "fact" underlying the lower court's opinion. According to the majority below, "counsel failed to thoroughly inform DuBois about a critical problem with the State's scientific evidence—that the carpet had been housed in a garbage dump . . . ." App. 41a. Not only was this "fact" not presented to the state court but *DuBois's own testimony in federal court contradicts it*. According to DuBois, the trial counsel *did* tell him about it:

> But I do recall [Kluge] told me that the carpeting had been thrown out and—I probably misstated whether or not he told me it had been sampled and then thrown in the dumpster or thrown in the dumpster then sampled. But I did know that there was some questionable handling of the carpeting after the fire, and [Kluge] was rather upset about it.

R.105, Dep. of L. Gregory DuBois, 6th Cir. Joint App. at 6334. That is, not only did the Sixth Circuit improperly rely on new facts in its unreasonable application analysis, but at least some of those "facts" were simply wrong.

The points listed above are merely illustrative. Virtually every fact on which the panel majority relied was disputed, and either had been resolved differently in state court, or had not even been presented to the state courts at all. And the key point for purposes of this petition is that the panel majority, in relying on these "facts," did not even purport to apply AEDPA's mandated framework. Certainly, the state court's *Strickland* analysis could not have been "objectively unreasonable" in failing to consider "facts" that Richey did not even present, especially as he makes no effort to show, and could not show, that these facts were unavailable at the time of the state court proceedings. See 28 U.S.C. § 2254(e)(2). Nor did the Sixth Circuit even purport to show that, with regard to the facts the state court did find, there was "clear and convincing evidence" that those factual findings were incorrect. See 28 U.S.C. § 2254(e)(1). The absence of such analysis, in and of itself, reflects the clear conflict between the language of AEDPA and Court's precedent interpreting it on the one hand and the decision below on the other.

Either of the failings above is sufficient, standing alone, to show that the Sixth Circuit erred in granting relief on Richey's ineffective assistance claim. Taken together, Ohio

respectfully suggests that summary reversal is appropriate. At the very least, in concert with the court's resolution of the transferred intent issue—which dramatically expands federal power over state court criminal issues—the court's failure to follow AEDPA's framework in assessing the ineffective assistance claim clearly demonstrates the need for immediate review and correction.

AEDPA, properly applied, respects the strong federalism interests at stake when federal courts review state court criminal convictions. The decision below, in failing to follow that framework, unsettled that balance and created conflict among the circuits that urgently calls for review. Ohio respectfully requests that the Court accept this case to address that conflict and to prevent the federal encroachment on state court criminal convictions that the opinion invites.

CONCLUSION

For all of the above reasons, Ohio urges the Court to grant the State's petition and reverse the Sixth Circuit's decision.

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July 14, 2005

Supreme Court, U.S.
FILED

05-101 JUL 14 2005

OFFICE OF THE CLERK

No. _____

In The Supreme Court Of The United States

MARGARET BRADSHAW, Warden,

Petitioner,

v.

KENNETH T. RICHEY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX

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TABLE OF CONTENTS

Page

Appendix A: Opinion, United States Court of Appeals for the Sixth Circuit, Jan. 25, 2005 ..... 1a

Appendix B: Order Denying Rehearing, United States Court of Appeals for the Sixth Circuit, April 15, 2002..... 60a

Appendix C: Memorandum of Opinion and Order, United States District Court for the Northern District of Ohio, Eastern Division, April 3, 2001 ..... 62a

Appendix D: Order, United States Court of Appeals for the Sixth Circuit, April 2, 2004 (certified question to the Ohio Supreme Court)..... 220a

Appendix E: Order, Supreme Court of Ohio, June 9, 2004 (certified question) 234a

Appendix F: Opinion, Supreme Court of Ohio, Aug. 12, 1992 (direct appeal)..... 235a

Appendix G: Opinion, Ohio Court of Appeals, Dec. 28, 1989 (direct appeal of conviction)..... 272a

Appendix H: Opinion, Ohio Court of Appeals, Dec. 28, 1989 (direct appeal of sentence)..... 323a

Appendix I: Opinion, Supreme Court of Ohio, Aug. 30, 1995 (reopen direct appeal)..... 328a

Appendix J: Journal Entry, Ohio Court of Appeals, Jan. 4, 1995 (reopen direct appeal)..... 331a

Page

Appendix K: Order, Supreme Court of Ohio, Mar. 11, 1998 (appeal of first petition for post-conviction relief) 335a

Appendix L: Opinion, Ohio Court of Appeals, Nov. 18, 1997 (appeal of first petition for post-conviction relief) 336a

Appendix M: Findings of Fact, Conclusions of Law, Entry Denying Petition to Vacate or Set Aside Sentence Without A Hearing, Ohio Court of Common Pleas, May 14, 1997 (first petition for post-conviction relief) 343a

Appendix N: Ohio Revised Code Ann. 2903.01. Aggravated Murder 359a

APPENDIX A

UNITED STATES COURT OF
APPEALS FOR THE SIXTH
CIRCUIT

No. 01-3477

KENNETH T. RICHEY,
Petitioner-Appellant,
v.
BETTY MITCHELL,
Warden, Respondent-Appellee.

395 F.3d 660

May 7, 2003, Argued
January 25, 2005, Decided
January 25, 2005, Filed

ARGUED: Paul E. Nemser, GOODWIN PROCTER LLP, Boston, Massachusetts, for Appellant.
Michael L. Collyer, OFFICE OF THE ATTORNEY GENERAL OF OHIO, Cleveland, Ohio, for Appellee.
ON BRIEF: Paul E. Nemser, Kenneth J. Parsigian, GOODWIN PROCTER LLP, Boston, Massachusetts, for Appellant. Michael L. Collyer, OFFICE OF THE ATTORNEY GENERAL OF OHIO, Cleveland, Ohio, for Appellee.
John J.P. Howley, KAYE SCHOLER LLP, New York, New York, for Amicus Curiae.

Before: SILER, DAUGHTREY, and COLE, Circuit Judges. COLE, J., delivered the opinion of the court, in which DAUGHTREY, J., joined. SILER, J., delivered a separate dissenting opinion.

R. GUY COLE, JR., Circuit Judge. Kenneth T. Richey was arrested, convicted, and sentenced to be executed for intentionally starting an apartment fire that killed two-year-old Cynthia Collins. He continues to maintain his innocence. Following a series of unsuccessful appeals in the Ohio state courts, Richey petitioned the district court for a writ of habeas corpus, and the court denied his request. Richey now appeals this decision. Because constitutional errors have undermined our confidence in the reliability of Richey's conviction and sentence, we REVERSE the decision below.

I. BACKGROUND

On June 30, 1986, at approximately 4:15 a.m., a fire started in the second-floor apartment of Hope Collins, who was elsewhere at the time. Her two-year-old daughter, Cynthia, was alone in the apartment, and she died in the fire. The Fire Chief initially blamed the fire on an electric fan, but then asked Assistant State Fire Marshal Robert Cryer to investigate further. Cryer arrived at the apartment at 6:30 a.m. and spent most of the day investigating. The next day, Cryer told the prosecutor's office that he believed that the fire had resulted from arson.

Cryer based his conclusion solely on his belief that some of the burn patterns he found at the apartment demonstrated the presence of accelerants. He found no empty containers of flammable liquids. From the apartment, Cryer took nothing that the Ohio Arson Crime Laboratory ("State Arson Lab") could test for the presence of accelerants, nor did he order the scene secured at the end of his June 30 investigation. Instead, Cryer authorized the building's owners to clean the

apartment. The owners discarded the damaged living room carpet, which ended up at a local garbage dump.

The police investigation quickly focused on Richey. On the morning of June 30, within hours of the fire, he was interviewed by the police chief. On July 1, Richey was arrested for arson and gave a tape-recorded interview to the police, who were joined by Cryer and a prosecutor. Although acknowledging that he was intoxicated and therefore did not remember much of what happened early in the day on June 30, Richey denied starting the fire. Because gasoline and paint thinner were stored in an unlocked greenhouse across the street from the apartment building, the State theorized that Richey had obtained these materials from that greenhouse. However, the owner of the greenhouse was unable to determine whether any gasoline or paint thinner was missing, and Cryer took none of the accelerants from the greenhouse to compare with the materials at the fire scene.

On July 10, 1986, a grand jury charged Richey with: (1) aggravated felony murder; (2) aggravated arson; (3) breaking and entering; (4) involuntary manslaughter during the commission of a felony; and (5) child endangerment. The court appointed two attorneys to defend Richey against the charges, to which he pled not guilty, not guilty by reason of insanity, and not competent to stand trial by reason of insanity. The trial court ordered Richey to undergo a psychiatric examination, and he eventually withdrew his insanity plea and was adjudged competent to stand trial. In late 1986, Richey waived his right to a trial by jury, and agreed to be tried before a three-judge panel, under Ohio Revised Code Section 2945.06. The heart of the indictment against Richey was the charge of aggravated felony murder, which, if proven, made him eligible for the death penalty. According to the statute in effect at the time, an aggravated felony murderer must have "specifically intended to cause the death of the person killed[--]the prosecution must prove

the specific intent of the person to have caused the death by proof beyond a reasonable doubt." OHIO REV. CODE ANN. § 2903.01(D). The State concedes that it presented no evidence that Richey specifically intended to kill Cynthia Collins. Rather, the State hypothesized that Richey set fire to the Collins apartment so that he could kill his ex-lover, Candy Barchet, and her new boyfriend, Mike Nichols, who were spending the night together in the apartment below. The testimony at trial established that Barchet moved into the building on June 15, and that within a few days she and Richey progressed to a sexual relationship. Apparently, Richey frequently told Barchet that he loved her and would kill any other men she dated. John Butler testified that on June 24, he had sex with Barchet, and that when Richey learned of this encounter, he confronted Butler while carrying a knife. Right after the confrontation, Richey broke his hand by punching a door.

On June 29, Richey attended a party hosted by Peggy Villearreal, who lived next door to Hope Collins. Barchet brought Nichols to the party, kissed him in plain view of the other guests, told Richey that she wanted to date Nichols, and later took Nichols home with her. Several witnesses testified that Richey - who was intoxicated that night - became upset upon learning of Barchet's new boyfriend. One witness testified that Richey proclaimed that "if I can't have Barchet, nobody else can." Three other witnesses testified that Richey told them that Building A, the subsection in which Barchet resided, "was going to burn" that night.

Hope Collins testified that around 2:00 a.m., as the party began to wane, Richey asked her if he could sleep on her sofa that night, but she refused. Collins testified that Richey offered to steal some flowers for her from the greenhouse located across the street, but she declined his gesture. Shortly after 3:00 a.m., a friend of Collins drove up to the building and asked Collins to go out with him that night. Collins told

him that she did not have a babysitter. According to Collins, Richey volunteered to "keep an eye" on Cynthia, as long as he could sleep on Collins's couch. Collins testified that at 3:30 a.m., with Cynthia in Richey's care, she went out with her friend.

The fire started at about 4:15 a.m. Five eyewitnesses testified that after Richey emerged onto the scene: (1) he repeatedly hollered that "there's a baby in the house"; (2) he repeatedly attempted to enter the burning apartment building to save Cynthia's life; (3) he proceeded so far into the building that "he came back out coughing and spitting up"; and (4) and police eventually had to restrain him from entering the building. The Assistant Fire Chief stated that Richey's efforts to save Cynthia "constituted that of a person who completely was disregarding his own safety." Conversely, another tenant testified that upon viewing the fire, Richey boasted that "it looks like I did a helluva good job, don't it."

As part of its investigation, the State eventually retrieved six samples of debris remaining from the fire. Several of those samples came from the carpet that had first found its way into the garbage dump. On the afternoon of July 1, nearly two days after the fire broke out, the Deputy Sheriff retrieved the carpet from the dump. One piece of carpet was recovered from atop the garbage pile, and another was partially covered by trash. Once removed, the carpet was placed in the sheriff's parking lot. The carpet stayed in the parking lot - located no more than forty feet away from gasoline pumps - for three weeks, before it was finally taken to the State Arson Lab for testing. Similarly, a wood chip sample was not removed from Collins's apartment for testing until July 17, nearly three weeks after the fire.

These samples were analyzed by the State Arson Lab using gas chromatograms, which one of the State's forensic

chemists, Dan Gelfius, described at trial as "scientific instrumentation that allows the differential migration of the components of hydrocarbons to separate and to give . . . a pattern similar to the identification of fingerprints." Basing his conclusions on a method of analyzing the chromatograms that has neither been published nor peer-reviewed, Gelfius testified that both a sample of carpet from Collins's living room and a sample of wood from her balcony contained paint thinner, and that another sample of the living room carpet contained gasoline. The State detected no traces of accelerants on the other three samples from the apartment, the clothing and boots that Richey wore on June 29, or the bandage that covered his broken hand.

Gelfius was unaware of the carpet's removal to the local garbage dump and then to the sheriff's parking lot until he arrived to testify at trial. He has since acknowledged that, had he known about these detours, he would have been "very concerned" and "probably work wouldn't have been done on this case." The missing links in the carpet's chain of custody did not disturb Assistant State Fire Marshal Cryer, because he believed that the same paint thinner was found on both the living room carpet and the balcony. However, this turned out to be false: the Chief of the State Arson Lab, Mohammed Gohar, and Gelfius have since acknowledged that the State Arson Lab did not - and would not have even been able to - "match" the paint thinner purportedly found on the deck to the paint thinner purportedly found on the carpet.

Yet the State's scientific evidence went unchallenged at trial. Richey's forensic expert for the trial was L. Gregory DuBois of the firm CTL Engineering. Richey's trial counsel acknowledged that DuBois "was not recommended by any civil defense attorney or any other attorney." Instead, trial counsel learned about DuBois's firm through an advertisement that he received in the mail. Trial counsel stated that he "called CTL because they advertised [that] they

had experts in arson investigation, and [DuBois] was the one [that CTL] sent up." CTL sent DuBois, whose formal education was limited to a bachelor's degree in metallurgical engineering and a partially completed stint in business school. Although accredited in Ohio as an accident reconstructionist, he primarily performed "vehicle accident reconstructions." He had no accreditations in arson or fire investigations. Moreover, although DuBois was a member of the American Society for Testing Materials, the membership was solely through CTL; DuBois had no individual membership in the group, and he had attended no "seminars or other educational venues sponsored by the ASTM." Similarly, although DuBois was a member of the International Association of Arson Investigators ("IAAI"), his involvement was limited to receiving quarterly publications in the mail, and at the time he was hired by Richey's trial counsel, he had attended no IAAI seminars on fire investigation. Finally, although DuBois had participated in numerous arson investigations with CTL, he did so in a supporting role: "typically, [he] would review the results [of the investigations] with the chemist who performed the analyses."

DuBois's resume, which trial counsel had received, indicated that he worked as a metallurgical engineer, and that his arson-related training consisted of only two two-day courses, neither of which involved the subject of burn patterns. Both courses were taught by personnel from the State Arson Lab, whose inculpatory conclusions DuBois was hired to review. Moreover, DuBois admitted that he admired Mohamed Gohar--Chief of the State Arson Lab, who oversaw the testing in Richey's case--and he believed that Gohar stayed at the forefront of technology and was "quite authoritative in his field." At the time he was hired, DuBois believed that the state fire marshal's office did a better job of fire sample analysis than his own employer did.

Although Richey's trial counsel had been appointed on July 14, 1986, and received the State Arson Lab reports on August 5, 1986, he did not meet with DuBois (or any other potential expert) until September 11, 1986. At that meeting, according to DuBois, trial counsel told him that "he was interested in keeping costs to a minimum, ... and he told [DuBois] that he wanted about ten hours in the initial investigation." Trial counsel did not ask DuBois what type of work was necessary to investigate the fire; according to DuBois, "the ten hours was given to me by [trial counsel] as an implied budget, that this was what he could afford in this particular case to have the time spent, and he wanted to know what could I do for ten hours worth of time." It was not until November 18, 1986 that trial counsel contacted DuBois again, and in the interim DuBois did no further work on the case. By this point, despite having had no idea what conclusions DuBois would draw, trial counsel had already put his name on the witness list.

When his investigation finally began, DuBois contacted Gohar. The two "worked together, went through each chromatogram, and [DuBois] had [Gohar] show [him] which standard he used and what result he got, and which sample matched which chromatogram." DuBois conducted no independent testing of the samples, nor did he interview Cryer or otherwise attempt to analyze the growth and spread of the fire. Trial counsel, however, "wasn't aware that [DuBois] had not done any [independent testing] until well after the trial." Although trial counsel never asked DuBois to perform any independent testing, he "assumed [DuBois] would do more than just look at the reports of Cryer." Furthermore, when DuBois presented his findings to trial counsel, counsel did not ask him what his basis was for those findings. DuBois, who submitted no written report to trial counsel, confirmed that counsel "was surprisingly nonargumentative with me [and] didn't challenge me on what

I thought or why I thought what I did or anything." Nor did DuBois recall counsel ever asking him about any problems with the State's evidence.

Rather, admitted trial counsel, "once DuBois confirmed that everything Cryer had done was accurate and appeared to be in order, we decided at that point not to use him." Reading between the lines, the State then subpoenaed DuBois to testify *against* Richey. DuBois contacted trial counsel and asked for his help in resisting the subpoena, but he received none. According to DuBois, he was told by Richey's counsel that "I'll [DuBois] just have to do what I have to do." Consequently, Richey's sole forensic expert testified at Richey's trial against him, acknowledging that he found nothing wrong with the State's conclusions. Trial counsel neither cross-examined DuBois nor presented any other scientific evidence.

When informed, following trial, about the full extent to which the carpet had been diverted prior to arriving at the State Arson Lab, DuBois responded that "I don't think [that counsel] told me the entire sequence of events involving the carpeting after the fire and before trial. "When asked whether this information would have affected his acquiescence to the State's scientific conclusions, DuBois remarked that:

> I don't know if I knew that at the time I did this investigation. And it raises a problem with spoilation of this evidence. I'm having trouble right now telling you whether or not that changes my opinion or affects it.
>
> I'm looking - I looked at this fire and I looked at a lot of things together in reaching my conclusion about this fire. And if you take out a piece of this puzzle, then I would have to re-evaluate what's left about this fire.

The panel found Richey guilty on all counts (except involuntary manslaughter, which was a lesser alternative to aggravated felony murder), including aggravated felony-murder. At the death penalty sentencing hearing, Richey presented an array of evidence about his background and upbringing. He had received his first mental evaluation at age thirteen, and had been repeatedly treated at mental institutions. A psychologist testified that Richey suffers from a borderline personality disorder and antisocial personality disorder, and that he functions at the emotional level of a ten- or eleven-year-old. A social worker testified that Richey suffers from "histrionic behavior disorder."

The panel unanimously sentenced Richey to death. It concluded that "Richey purposely and with specific intent caused the death of Cynthia Collins" and disagreed that mitigation was warranted by Richey's attempt to save her. Instead, the panel opined that "this final contention of the defendant was immediately disposed of when placed in juxtaposition to the unrefuted evidence that the defendant pulled the fire alarm from the hall prior to torching the decedent's apartment and effectively eliminated the chance that Cynthia Collins would awaken and escape her own demise."

The "unrefuted" evidence supporting the panel's conclusion that Richey had pulled the fire alarm--which even the State did not argue--was the testimony of Cryer, who noted that he saw the smoke detector hanging from the ceiling by its wires, eight inches below the ceiling, when he arrived at the apartment the morning after the fire. (At trial, Hope Collins testified to her belief that the smoke detector had been connected and functioning in the hours prior to the fire.)

On direct appeal, Richey was represented by counsel from the Ohio Public Defender Commission. After he

reviewed the trial record, appellate counsel discussed the appealable issues with his supervisor, and expressed his view that trial counsel's "representation of Mr. Richey had been markedly deficient and that the deficiencies had severely prejudiced Mr. Richey's defense." According to appellate counsel:

> [My supervisor], who is a personal friend of [trial counsel], listened to my views regarding the prejudicial deficiencies of [trial counsel's] representation of Mr. Richey, and responded by saying that I should do the best job I could without raising the ineffective assistance of trial counsel issues. [My supervisor] did not tell me that the ineffectiveness arguments I wanted to make lacked merit. He simply told me not to make them . . . . [he] left me with no doubt that if I were to push on the ineffective assistance of counsel issues, he would not be pleased and my job rating would suffer. This was not the first time [my supervisor] had directed me and others in our office not to raise ineffectiveness issues in a brief. On an earlier occasion I had to sneak into the office after hours to put an ineffective assistance of counsel argument back in a direct appellate brief after [my supervisor] had taken it out.

Yet appellate counsel averred that "the errors made by [trial counsel] were too egregious to be completely ignored. Therefore, I raised ineffective assistance of trial counsel as an appellate issue. . . but did so in a relatively weak fashion so that I would not have too severe a confrontation with [my supervisor]. Furthermore, I did not raise many of the specific instances of trial counsel's ineffectiveness that I had noted in reviewing the record, and did not research what I regarded as

other potentially meritorious ineffective assistance of counsel arguments."

The Ohio Court of Appeals affirmed Richey's conviction and sentence. *State v. Richey*, 1989 WL 156561 (Ohio Ct. App. Dec. 28, 1989); *State v. Richey*, 1989 WL 156562 (Ohio Ct. App. Dec.28, 1989). By a vote of four to three, the Ohio Supreme Court affirmed. *State v. Richey*, 64 Ohio St. 3d 353, 1992 Ohio 44, 595 N.E.2d 915 (Ohio 1992), *rehearing denied* 65 Ohio St. 3d 1421, 598 N.E.2d 1172 (table). The U.S. Supreme Court denied certiorari. *Richey v. Ohio*, 507 U.S. 989, 123 L. Ed. 2d 157, 113 S. Ct. 1592 (1993), *rehearing denied*, 508 U.S. 934, 124 L. Ed. 2d 303.

At this point Richey retained new counsel, who uncovered new evidence and retained new scientific experts. Counsel submitted an affidavit from Villearreal, who recanted her trial testimony, claiming that "I never heard Kenny Richey say anything about burning 'A Building' or about using Marine Corps tactics to burn the building. I don't recall exactly what I said at [Richey]'s trial, but if I said anything about [Richey] threatening to burn A Building or about using Marine Corps tactics, I was wrong." Villearreal further averred that during and after the party, Richey "was at ease, having fun and enjoying himself. He was not angry about anything[, and] expressed no anger toward Candy Barchet, Mike Nichols or anybody else."

Villearreal also contended that Cynthia "was always into everything, including matches and lighters. Sometimes when Hope and I would be drinking coffee and smoking cigarettes, Cynthia would grab our lighters and run into her bedroom." Villearreal detailed a number of incidents in which Cynthia's action failed to comport with basic fire safety, including one in which Cynthia placed a lit cigarette between sofa cushions, and also averred that according to Hope, Cynthia had twice set fire to their beds, using, respectively, a curling iron and a

cigarette lighter. Villearreal also declared that she ate dinner at Collins's apartment the night of the fire, and that the smoke alarm was "hanging loose." Indeed, noted Villearreal, "Hope's smoke detector was almost always unhooked. It was very sensitive and would go off when we were just smoking cigarettes or even when just the oven was on. So Hope used to keep it unhooked."

According to Villearreal, her knowledge of these circumstances was no mystery to either the prosecutor or Richey's trial counsel. Specifically, Villearreal averred that "before Richey's trial for arson and murder, [she] spoke to [his] lawyer . . . about Cynthia Collins' playing with fire. "Villearreal expressed surprise that during Richey's trial, "no one asked me any questions about Cynthia's playing with fire." As for the prosecutor, Villearreal stated that she "also spoke with the prosecuting attorney . . . before [Richey]'s trial. I probably also told him about Cynthia's playing with fire but I don't specifically recall."

Richey's new forensic experts both castigated the State's scientific conclusions and surmised that DuBois' accession to them amounted to professional incompetence. Richard Custer, a specialist in fire reconstruction, testified that - even in 1986, when the State tested the samples - Cryer's conclusions were based on "unsound scientific principles." First, Custer opined that the burn pattern could also have resulted from a fire that occurred naturally, and that Cryer's theory of the accelerant's pour pattern and location would have required the use of ten gallons of fuel. Second, Custer testified that the irregular burn patterns on the deck - which Cryer believed indicated that accelerants were used - were caused simply by intense radiation. Indeed, elaborated Custer, whether or not an accelerant had been used, the fire would have spread downward, and any evidence of accelerant in the gaps would have been destroyed by the fire itself. Third, Custer discounted Cryer's belief that accelerant

use was evinced by the fire's speed, noting that rapidly spreading fires are common in residences with modern furnishings and room sizes. Finally, Custer dismissed Cryer's explanation for the state of the smoke detector - that it had been dislodged prior to the apartment's ignition - as speculative. Custer noted that the high temperature around the ceiling could easily have dislodged even a smoke detector that was mounted.

Custer concluded that the fire scene reflected an accidentally set fire that experienced "flashover"--a possible collateral consequence of the fire's radiated heat causing additional objects to combust. Custer produced three computer models detailing how the fire would have progressed had it spread accelerant-free, and determined that flashover would have occurred in the two most likely scenarios. Moreover, based on his knowledge of Hope Collins's smoking habits at the time, photographs that showed the presence of alcoholic beverages and smoking paraphernalia on the evening of the fire, and the fact that Collins and some of her friends had been using marijuana that evening, Custer concluded that the fire was likely caused by a carelessly discarded cigarette that had smoldered, for several hours, between the cushions of the living room couch.

Andrew Armstrong, Ph.D., a chemist and forensic scientist, echoed Custer's conclusions. Reviewing the State's raw data - and also applying what he believed to be contemporaneous scientific standards - Armstrong concluded that "there is no evidence of an identifiable ignitable liquid in any of the samples from the fire scene." The sample of wood obtained from the balcony revealed no paint thinner; the chromatogram from the sample did not "even look close" to the pattern associated with paint thinner, and instead revealed only turpentine, which occurs naturally in the type of wood used to construct patios. The pattern purportedly revealing

paint thinner in the carpet, opined Armstrong, did not conclusively indicate paint thinner, as it was also consistent with common household products such as furniture polish or insecticide. Moreover, although the State concluded that both of the aforementioned samples contained paint thinner, Armstrong testified that the two samples did not even reveal the same substance.

Armstrong also testified that the carpet sample which the State concluded contained gasoline lacked the "five peak component" pattern indicative of gasoline. Although acknowledging that the ASTM had yet to adopt the "five peak" standard in 1986, Armstrong testified that he and other experts employing gas chromatography knew of and relied upon the standard at that time. Noted Armstrong, "Many carpet samples that have been exposed to fire conditions contain [the compounds identified by the State Arson Lab] in some concentration." Armstrong stressed that only the "five peak" standard can eliminate false positives, and that "the elimination of false positives is of utmost importance." To the extent that the carpet did reveal gasoline, elaborated Armstrong, it would have been gasoline that had evaporated, and it would have been impossible to determine when the gasoline had reached the carpet. Armstrong agreed that the carpet could have absorbed gasoline from the parking lot - which, recall, was located near gasoline pumps - on which the carpet had rested for three weeks. Finally, Armstrong touched on a broader problem with the State's methodology that undermined its conclusions: no control samples had been compared with the tainted ones.

In April 1994, Richey moved to reopen his appeal, arguing that he lacked the effective assistance of appellate counsel. His motion was denied by the court of appeals, which was affirmed by the Ohio Supreme Court. *See State v. Richey*, 73 Ohio St. 3d 523, 1995 Ohio 329, 653 N.E.2d 344 (Ohio 1995). Richey's petition for postconviction relief was

denied by the trial and appellate courts, *State v. Richey*, 1997 WL 722782 (Ohio Ct. App. Nov. 18, 1997), and denied review by the Ohio Supreme Court, *State v. Richey*, 81 Ohio St. 3d 1467, 690 N.E.2d 1287 (Ohio Mar. 11, 1998) (table). Richey's second state postconviction petition was similarly denied by the trial and appellate courts, *State v. Richey*, 2000 WL 681642 (Ohio Ct. App. May 26, 2000), and further review was again denied by the Ohio Supreme Court, *State v. Richey*, 90 Ohio St. 3d 1427, 736 N.E.2d 25 (Ohio Oct. 4, 2000) (table).

Advancing to federal district court, Richey filed a petition for a writ of habeas corpus, alleging that both his conviction and sentence were tainted by constitutional errors. The district court denied Richey's petition. Although it refused to conduct an evidentiary hearing, the district court cited, in defense of the State's forensic conclusions, an extra-record article written by forensic scientist Anthony Cafe. Cafe has subsequently averred that the district court "miscited and misunderstood my published articles" and that "most of the world's leading forensic scientists in this field would be horrified if they saw the chromatograms used to convict Kenny Richey." Cafe warned that "if Kenny Richey were executed on the basis of this scientific evidence, then these chromatograms will become historical documents, examined by scientists all over the world and used to show just how wrong forensic evidence can be."

The district court certified for appellate review eight of Richey's grounds for relief. Richey timely appealed, and we added three claims to the certificate of appealability. Included in the certificate of appealability is the question of whether there was insufficient evidence to convict Richey of the crimes with which he was charged or tried, as well as whether he suffered ineffective assistance of counsel.

II. ANALYSIS

We apply the familiar habeas rules. Because Richey's petition was filed after April 24, 1996, it falls under the restrictions imposed by the Antiterrorism and Effective Death Penalty Act ("AEDPA"). *Lindh v. Murphy*, 521 U.S. 320, 326, 138 L. Ed. 2d 481, 117 S. Ct. 2059 (1997). AEDPA requires that we respect any determination made by the state court unless it: (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." 28 U.S.C. §§ 2254(d)(1)-(2); *see also Williams v. Taylor*, 529 U.S. 362, 146 L. Ed. 2d 389, 120 S. Ct. 1495 (2000). Within these constraints, we review the district court's legal conclusions *de novo*, but we may upset its factual determinations only if they were clearly erroneous. *Lott v. Coyle*, 261 F.3d 594, 606 (6th Cir. 2001).

A. Sufficiency of the Evidence

The heart of the prosecution against Richey - and the basis for his death sentence - was that he committed aggravated felony murder, which is prohibited by Ohio Revised Code § 2903.01. Richey argues that to convict a person of aggravated felony murder under the statute, the State is required to prove that the defendant intended to kill the person who actually died (in this case, Cynthia Collins), but that here, the State introduced no evidence that Richey actually intended to kill Cynthia. The State disputes this argument on the merits, and also urges that the claim has been procedurally defaulted. Because a discussion of the procedural default in this case requires an understanding of the merits, we will discuss the merits of the claim first.

1. Merits

The district court rejected Richey's statutory argument, ruling that "this claim is not cognizable in a federal habeas court as it is one touching purely on state law." In so holding, the district court misunderstood Richey's claim. According to *Fiore v. White*, 531 U.S. 225, 148 L. Ed. 2d 629, 121 S. Ct. 712 (2001), the federal constitution's Due Process Clause "forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt." *Id.* at 228-29. Therefore, the state law question regarding the elements of the crime predicates the enforcement of Richey's federal constitutional right. Thus, we must first look to state law to determine whether the State was required to prove, as an element of the crime, that Richey intended to kill the victim.

a. Elements of Aggravated Felony Murder

At the time of the fire, the statute at issue provided:

> (B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit . . . aggravated arson or arson . . . .
>
> ***
>
> (D) No person shall be convicted of aggravated murder unless he is specifically found to have intended to cause the death of another. . . . If a jury in an aggravated murder case is instructed that a person who commits or attempts to commit any offense listed in division (B) of this section may be inferred . . . to have intended to cause the death of any person who is killed during the commission of, attempt to commit, or flight from the commission of or

> attempt to commit the offense, the jury also shall be instructed that the inference is nonconclusive, that the inference may be considered in determining intent, that it is to consider all evidence introduced by the prosecution to indicate the person's intent and by the person to indicate his lack of intent in determining whether the person *specifically intended to cause the death of the person killed*, and that the prosecution must prove the specific intent of the person to have caused the death by proof beyond a reasonable doubt.

O.R.C. § 2903.01 (law effective prior to July 1996) (emphasis added).

Although subsection B, the felony murder section of the statute, mandates no nexus between the specific intent of the arsonist and the identity of the victim, subsection D, which informs the intent required under subsection B, mandates that the jury be instructed to consider whether the defendant "specifically intended to cause the death of *the person* killed, and that the prosecution must prove the specific intent of the person to have caused the death by proof beyond a reasonable doubt." O.R.C. § 2903.01(D) (emphasis added). The plain meaning is unmistakable: according to the statutory text, the defendant must have killed the person that he actually intended to kill.

Indeed, Ohio courts have interpreted subsection D of the statute in this exact way. In *State v. Maurer*, 15 Ohio St. 3d 239, 15 Ohio B. 379, 473 N.E.2d 768 (Ohio 1984), the court upheld an aggravated felony murder conviction under subsection D because the judge instructed the jury that it had to find beyond a reasonable doubt that not only did the defendant kill the victim in the course of a felony (a kidnapping), but also that "there was present in the mind of

the defendant a specific intention to kill Dawn Marie Hendershot," the person whom the defendant was charged with killing. *Id.* at 779; *see State v. Brewer*, 1984 Ohio App. LEXIS 10435, at *5, 1984 WL 6695 at *3 (Ohio Ct. App. July 18, 1984) (affirming conviction where the jury was instructed to determine "whether defendant specifically intended to cause Tewksbury's death," where Tewksbury was the person killed); *State v. Grant*, 67 Ohio St. 3d 465, 1993 Ohio 171, 620 N.E.2d 50, 62 (Ohio 1993) (upholding an aggravated felony murder conviction where the defendant "burned down an occupied home, known to contain children, in order to kill *the children*") (emphasis added); *see also Clark v. Jago*, 676 F.2d 1099, 1102 (6th Cir. 1982) ("Ohio has left the company of those jurisdictions which have traditional 'felony murder' offenses. . . . under Ohio law . . . purpose to kill is an essential element of the crime of aggravated murder."). n1

> n1 It is noteworthy that Ohio also has a separate felony murder statute under which defendants are not eligible for a death penalty specification. *See* OHIO REV. CODE ANN. § 2903.02(B). Richey was not convicted under this statute.

The State argues, however, that subsection D has no bearing on the elements of aggravated felony murder, and "does not require the State to do anything--it concerns jury instructions." This argument is curious, to say the least. First, it is clear from the statute and case law that the State is required to do something: it is required to prove the element of specific intent. Second, there is no meaningful difference between requiring the State to do something and requiring that the jury be informed that the State is required to do something. While the second formulation requires more words to articulate, its practical effect is identical. Nor is it

fathomable, as the State suggests, that Ohio's General Assembly intended to require specific intent when the defendant was tried by a jury, but not when the defendant was tried by a panel of judges. Such a reading would mean that the elements of the crime can change depending upon who the fact-finder is. n2 Because such a dichotomy would be unconstitutionally irrational, we are unable to embrace the State's interpretation. *See I.N.S. v. St. Cyr*, 533 U.S. 289, 299-300, 150 L. Ed. 2d 347, 121 S. Ct. 2271 (2001) (noting that statutes should be interpreted to avoid unconstitutional results). Consequently, in order to convict a defendant of the crime of aggravated felony murder in Ohio, the State must prove that the defendant specifically intended to kill the victim.

> n2 Richey correctly argues that were there truly a distinction in Ohio law between the elements that must be proven before a jury and those that must be proven before a panel of judges, trial counsel would have been obviously ineffective in advising Richey to bypass a jury, and with it the extra element that the State could not satisfy.

Not only does subsection D provide for the specific intent requirement, it provides for the one way that the State can more easily satisfy this requirement. The statute creates the possibility of a permissive inference by a jury, whereby the jury can infer from the circumstances of the felony, that the defendant intended to cause the death of the person actually killed. OHIO REV. CODE ANN. § 2903.01(D). The statute makes clear, however, that this inference is not conclusive, and that the jury must consider all the evidence on both sides, including any evidence presented by the defendant "to indicate his lack of intent in determining whether the

[defendant] specifically intended to cause the death of the person killed. . ." *Id.* Although the statute details a less onerous means by which the State can prove the specific intent of a defendant to kill the actual victim, even in this circumstance, the statute does not change the substance of what the State must prove: that the defendant intended to kill the very person who actually died. *See State v. Brewer*, 1984 Ohio App. LEXIS 10435, at *5, 1984 WL 6695, at *3 (Ohio Ct. App.).

b. Transferred Intent

In Richey's case, the State presented no evidence that he specifically intended to kill Cynthia Collins, and in fact conceded this point during oral argument before the state court. Instead, the State presented evidence that Richey had a motive to kill Candy Barchet and/or Mike Nichols, and thus, the State assumed that the doctrine of transferred intent could be used to find that Richey specifically intended to kill Cynthia. n3

> n3 The State relied solely on this theory of transferred intent to meet its statutory burden, and this approach in Richey's case dates back to the Bill of Particulars, where its stated, regarding Count One of the indictment that, "the purpose to cause the death of another, to-wit: Cynthia Collins arises from the intent of the Defendant to cause the death of Candy Barchet and/or Mike Nichols."

Because nothing in the language of O.R. C. § 2903.01 supports the idea that the Ohio General Assembly affirmatively intended for transferred intent to apply to aggravated felony murder, the State's sole argument would be that the doctrine of transferred intent, derived from the common law, applies to all intent crimes. However, the plain

text of O.R.C. § 2903.01(D) indicates that the statute not only fails to affirmatively permit transferred intent, it actually precludes it.

First, as previously stated, subsection D already specifies the single way in which the State is permitted to utilize a more flexible approach to proving specific intent: the permissible inference. Thus it would be overreaching for this Court to read into the statute another flexible approach, such as transferred intent. Second, as a general rule of statutory construction, every word has a meaning, and the courts should not render statutory language superfluous. *Hibbs v. Winn*, 542 U.S. 88, 159 L. Ed. 2d 172, 124 S. Ct. 2276, 2286 (2004); *D.A.B.E., Inc. v. Toledo-Lucas County Bd. of Health*, 96 Ohio St. 3d 250, 2002 Ohio 4172, 773 N.E.2d 536, 543 (Ohio 2002). In this case, the State urges us to construe the phrase "intended to cause the death of the person killed" to mean "intended to cause the death of another." The difference in meaning is profound, and it is worth noting that the Ohio General Assembly has actually used the phrase "death of another" in another statute: its traditional felony murder statute. *See* OHIO REV. CODE ANN. § 2903.02(B) (stating that "no person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offence of violence that is a felony"). The fact that similar language was not used in this statute appears purposeful, suggesting that Ohio chose to use a heightened intent requirement here, to make aggravated felony murder deserving of the death penalty.

Fortunately, we need not go so far as to interpret Ohio's statutory language to determine whether the law permitted transferred intent in aggravated felony murder cases. The Ohio courts themselves offered insight on this issue. At the outset, the assumption that the doctrine of transferred intent broadly overlays all intent crimes is incorrect. "Ohio courts have noted that the state legislature is aware of the doctrine

of transferred intent at times applying the doctrine and other times refusing to apply the doctrine to a statute." *In re A.C.T.*, 158 Ohio App. 3d 473, 2004 Ohio 4935, 816 N.E.2d 1098, 1100 (Ohio Ct.App. 2004). Although there have not been many judicial pronouncements on the narrow issue of applying transferred intent to aggravated felony murder, all the cases that directly touch upon it suggest that the doctrine is inapplicable here. In *State v. Sowell*, 39 Ohio St. 3d 322, 530 N.E.2d 1294 (Ohio 1988), the defendant relied on OHIO REV. CODE ANN. § 2903.01(D) to argue that transferred intent could not support his conviction for aggravated (non-felony) murder under § 2903.01(A). In rejecting his argument, the Ohio Supreme Court drew a distinction between the two subsections' treatment of transferred intent, such that subsection D could not be read to vitiate the incorporation of transferred intent in subsection A. *See id.* at 1305. In so doing, the court explicitly limited its application of transferred intent to cases of aggravated murder, not aggravated felony murder. *See id.* This suggests that the doctrine of transferred intent did not apply to subsection D, and at the very least, makes clear that the doctrine of transferred intent is not so over-arching as to be automatically applicable in proving all intent crimes. One Ohio court has gone further to state that:

> The doctrine [of transferred intent] has been applied for many years in Ohio but has apparently been removed by the legislature from application in aggravated murder cases. In revising R.C. 2903.01(D), the legislature [enacted the text at issue]. . . The legislature did *not* remove the doctrine of transferred intent from application in determining the absence or presence of purpose to kill in murder, as opposed to aggravated murder, convictions. The limitation of the legislative reference to

> aggravated murder implies to a point that the legislature intended for the doctrine of transferred intent to have applicability in situations involving lesser crimes such as murder.

State v. Mullins, 76 Ohio App. 3d 633, 602 N.E.2d 769, 771 (Ohio Ct. App. Feb. 4, 1992) (upholding a murder conviction based on transferred intent where the defendant, though was initially indicted on a charge of aggravated murder, was actually found guilty by the jury on a charge of non-aggravated murder). n4 The preceding state case law - and it is the only Ohio case law at the time that squarely addressed this issue - indicates that transferred intent does not apply to subsection D of the aggravated felony murder statute. Accordingly, in determining what the required elements of aggravated felony murder were under OHIO REV. CODE ANN. § 2903.01, we are compelled to adhere to Ohio's specific pronouncements at the time of Richey's conviction and state appeals. Therefore, because the State chose to prosecute Richey for aggravated felony murder (subsection B and D) of the statute, rather than straight aggravated murder (subsection A), the State had to prove, as an element of the crime, that Richey intended to kill Cynthia Collins.

> n4 The court's statement was quite broad, seeming not to make the distinction between aggravated murder and aggravated felony murder that the *Sowell* Court did. However, this distinction was not relevant for the *Mullins* Court's decision because it focused primarily on the difference between murder and aggravated murder.

The State does not address the aforementioned case law head-on. Instead, the State claims that the case law was

addressed and disposed of by the Ohio Supreme Court. Thus, the State turns a blind eye to the status of the law at the time of Richey's conviction and the filing of his appeal; n5 it instead relies on the Ohio Supreme Court's pronouncement in Richey's case to support its interpretation of what elements it needed to prove.

n5 In affirmative support of its position, the State does point to *State v. Phillips*, 74 Ohio St. 3d 72, 1995 Ohio 171, 656 N.E.2d 643 (Ohio 1995), and *State v. Coleman*, 37 Ohio St. 3d 286, 525 N.E.2d 792 (Ohio 1988) to show that subsection D is only applicable when a judge instructs a jury, and that therefore in Richey's case, where there was no jury, transferred intent was applicable. These cases do not support the State's proposition. In *Phillips*, the issue was whether the jury received proper instructions in an aggravated felony murder case. The defendant claimed that the jury should have been instructed that any inference that it made regarding specific intent was permissive, not conclusive. 656 N.E.2d at 668. The court determined that its more general instructions were sufficient, because the State never opted to use the permissive inference in subsection D, the jury was never told that it could make an inference, and therefore an instruction regarding the inference was unnecessary. *Id. Phillips* is not about transferred intent, and it simply does not speak to whether transferred intent can be used in aggravated felony murder cases. The same is true in *Coleman*, where the court determined that jury instructions comported with subsection D because they conveyed to the jury that any inference of specific intent that was drawn from the nature of the crime was nonconclusive. 525 N.E.2d at 796. The cases cited by the State do not impact the decision before us in any

> way, they simply expound upon the permissive inference in subsection D, which neither party even suggests was used in Richey's case.

First, it is unclear if the issue of transferred intent as applied to subsection D of the statute was truly decided by the Ohio Supreme Court. The State points to a portion of the court's opinion entitled "Sufficiency of the Evidence," where the Ohio Supreme Court explains why there was sufficient proof that Richey was the arsonist. *State v. Richey*, 64 Ohio St. 3d 353, 1992 Ohio 44, 595 N.E.2d 915, 924 (Ohio 1992). Although this section addressed many issues, the court stated that, "The fact that the intended victim escaped harm, and that an innocent child, Cynthia Collins, was killed instead, does not alter Richey's legal and moral responsibility." *Id.* at 925. The court then proclaimed that "transferred intent is firmly rooted in Ohio law." Critically, it cited only cases addressing subsection A of the statute-cases dealing with aggravated murder and not aggravated felony murder, for which Richey was convicted.

However, even assuming that the Ohio Supreme Court's brief statement in Richey's case was meant to interpret the aggravated felony murder statute, n6 that court, although it has the ultimate authority in interpreting state law, would have been offering a novel, or at least unforeseen, interpretation of the statute. Prior to the holding in Richey's case, both the text of the statute and its treatment by the Ohio courts strongly indicated that transferred intent could not be applied to aggravated felony murder. We have not found a single Ohio case where transferred intent was applied and upheld where the defendant was charged with aggravated felony murder, whereas the language in *Sowell* and *Mullins* suggests the contrary. Thus, under the State's interpretation of the Ohio Supreme Court's opinion, the court would have been expanding what at the time was the known scope of the

statute, raising what the United States Supreme Court has described as a most serious due process concern: "that a statute precise on its face has been unforeseeably and retroactively expanded by judicial construction." *Bouie v. City of Columbia*, 378 U.S. 347, 351, 12 L. Ed. 2d 894, 84 S. Ct. 1697 (1964).

> n6 It should be noted that we certified the statutory question regarding transferred intent to the Ohio Supreme Court, which declined to answer this question.

It is well settled that the government cannot establish the sufficiency of the evidence by resorting to an unforeseeable judicial construction of a criminal statute. The Supreme Court in *United States v. Lanier*, 520 U.S. 259, 137 L. Ed. 2d 432, 117 S. Ct. 1219 (1997), n7 stated what it deemed to be the three manifestations of the fair warning requirement:

> First, the vagueness doctrine bars enforcement of a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. Second . . . the canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered. Third, although clarity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute, due process bars courts from applying a novel construction of a criminal statute to conduct that neither the

> statute nor any prior judicial decision has fairly disclosed to be within its scope.

Id. at 266 (internal citations and quotations omitted). *See Gall v. Parker*, 231 F.3d 265, 305-06 (6th Cir. 2001) (granting writ of habeas corpus upon holding that elimination of an element of a crime, or altering the necessary proof by the state supreme court violated Due Process Clause when both the plain text of the statute and prior state court decisions instructed otherwise; *see also Rabe v. Washington*, 405 U.S. 313, 316, 31 L. Ed. 2d 258, 92 S. Ct. 993 (1972) (reversing as violative of the Due Process Clause a state law conviction that rested on unforeseeable judicial interpretation of a criminal statute).

> n7 The *Lanier* Court noted that in order to satisfy the fair warning requirement, there need not be a court pronouncement applying the rule in a case with facts "fundamentally similar" to the one at bar. 520 U.S. at 268. However, in Richey's case, although there was certainly no Ohio case definitively reading transferred intent into subsection D, there were strong indications that it was to be read out of subsection D.

Accordingly, if the Ohio Supreme Court deliberated on, and decided the issue presented before us now, it would have been a novel interpretation of the statute, because the plain meaning and the court pronouncements in *Sowell* and *Mullins* indicated the opposite of what the State now urges. Prior to Richey's appeal before the Ohio Supreme Court, an Ohio appeals court (*Mullins*) actually cited to subsection D of the aggravated felony murder statute as an example of an instance where the Ohio General Assembly read *out* of a statute the transferred intent doctrine. Furthermore, to the

extent that the statute is ambiguous, the rule of lenity ensures that the requirement of fair warning is met by resolving doubts in favor of the defendant. *United States v. Bass*, 404 U.S. 336, 348, 30 L. Ed. 2d 488, 92 S. Ct. 515 (1971). Although the Ohio Supreme Court is the ultimate arbiter of the State's laws, the fact that the law prior to Richey's final state appeal points to an interpretation of the statute without transferred intent raises serious due process concerns of retroactivity and notice. It must be said that this Court cannot decide what Ohio law should be, and that the Ohio Supreme Court could certainly decide that transferred intent was meant to apply to subsection D of the statute, were its decision to be made in a vacuum. However, because there was not a single judicial pronouncement suggesting that transferred intent could be used under subsection D, and because the prior case law affirmatively indicates to the contrary, the Ohio Supreme Court would have raised a federal constitutional concern of impermissible retroactivity, had it authoritatively read transferred intent into subsection D. Therefore, if we accept the State's interpretation of the Ohio Supreme Court's opinion as having done this, it would have been a retroactive or novel application of a statute which would have violated Richey's clearly established rights under the Due Process Clause.

The State could point to no Ohio law, prior to Richey's own case, that stands for the proposition that transferred intent applies in aggravated felony murder cases. Thus, in compliance with Ohio law, we must find that the State could not apply transferred intent in order to satisfy the specific intent requirement in an aggravated felony murder case. Whether or not the Ohio Supreme Court reached the issue of transferred intent as applied to subsection D, the State did not meet its burden of proving all the required elements of aggravated felony murder. Based on the state of the law at the time of his actions, the only way that Richey could have

been constitutionally convicted of aggravated felony murder would have been upon a showing that Richey intended to kill the person that actually died. Because it is undisputed that there was no evidence to this effect, Richey's conviction necessarily lacked the support of sufficient evidence.

2. Procedural Default

Aside from the merits, the State argues that Richey has defaulted this claim because he failed to press this argument during his direct appeal. "In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991). Richey concedes that he did not raise the claim at trial or on direct appeal, as he was required to by Ohio rules.

The first problem with the State's argument that the claim was defaulted is the question whether the state courts actually relied on an independent ground to deny Richey relief on this claim. The ground is independent "only if the state court rendering judgment in the case clearly and expressly stated that its judgment rested on a procedural bar." *Simpson v. Sparkman*, 94 F.3d 199, 202 (6th Cir. 1996). In other words, a lapsed claim survives if the state court overlooked the default and decided the claim anyway. *See Warden v. Hayden*, 387 U.S. 294, 297 n.3, 18 L. Ed. 2d 782, 87 S. Ct. 1642 (1967). Thus, if, as the State contends, the Ohio Supreme Court did decide Richey's claim regarding transferred intent, this Court is free to review the claim without concern regarding the procedural bar. While we express doubt regarding whether the Ohio Supreme Court

truly considered transferred intent as applied to subsection D of the statute, it is clear that the Ohio Supreme Court considered the issue of transferred intent generally with regards to Richey's case. The court stated that "the culpability of a scheme designed to implement the calculated decision to kill is not altered by the fact that the scheme is directed at someone other than the actual victim." *Richey*, 595 N.E.2d at 925 (internal quotations omitted). Moreover, at no point did the Ohio Supreme Court hold, or even intimate, that Richey had forfeited the chance to contest the sufficiency of the evidence supporting his conviction. Because the United States Supreme Court requires a "'plain statement' that a [state court] decision rests upon an adequate an independent state ground[]," *Michigan v. Long*, 463 U.S. 1032, 1042, 77 L. Ed. 2d 1201, 103 S. Ct. 3469 (1983), we must interpret this ambiguity to mean that the Ohio Supreme Court reached the issue of transferred intent. Therefore, there was no independent state ground barring our review.

Additionally, Richey argues that the ineffective assistance of his trial and appellate counsel supplies the cause needed to excuse his procedural default. Indeed, "ineffective assistance of counsel can supply the cause that, together with prejudice, would excuse a procedural default." *McFarland v. Yukins*, 356 F.3d 688, 699 (6th Cir. 2004). To demonstrate cause for the procedural default, Richey must show that both his trial and appellate counsel were ineffective. He must demonstrate that trial counsel was ineffective for failing to challenge the sufficiency of the evidence, and he must establish that appellate counsel was ineffective for failing to argue that trial counsel was ineffective for failing to challenge the sufficiency of the evidence. Whether appellate counsel was ineffective for failing to raise the ineffectiveness of trial counsel (predicated on trial counsel's failure to challenge the sufficiency of the evidence) turns, of course, on whether appellate counsel would have been ineffective,

absent the default below, for failing to challenge the sufficiency of the evidence. To convince us that his counsel was ineffective, Richey must demonstrate that: (1) counsel's performance was deficient; and (2) that the deficiency produced prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984).

Richey encounters a threshold hurdle in asserting the ineffectiveness of his appellate counsel: he may not rely on ineffective assistance as cause to excuse the procedural default of his transferred intent/sufficiency of the evidence claim, if the ineffectiveness assistance claim is itself procedurally defaulted. Ohio Rule of Appellate Procedure 26(B) provides that "[a] defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel. An application for reopening shall be filed . . .within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time." Richey's motion to reopen his appeal in the Ohio courts--in which he asserted that his appellate counsel was deficient--was untimely, and the Ohio Supreme Court denied the motion as untimely. *See Richey*, 653 N.E.2d at 345. The question remains, however, whether the rule was an "adequate" basis to preclude federal relief. "[A] rule is adequate if it is regularly or consistently applied by the state court[.]" *White v. Schotten*, 201 F.3d 743, 751 (6th Cir. 2000). Richey argues that the rule does not fall within this criterion because it provides no definition of what constitutes "good cause" for an untimely filing and because the Ohio courts had neither articulated meaningful standards nor consistently applied any type of criteria.

The district court below held that Richey had not defaulted his ineffective assistance claim because "certainly as of the date [that] Richey filed his Rule 26(B) application, the 'good cause' rule had not yet been applied with the

regularity necessary to constitute an adequate and independent state procedural rule." *See also Anderson v. Attorney General*, 342 F.3d 1140 (10th Cir. 2003) ("State procedural rules that bar ineffective assistance of counsel claims are further reviewed with a healthy degree of skepticism.") (internal quotations omitted); *Page v. Frank*, 343 F.3d 901, 909 (7th Cir. 2003) (same).

We agree with the district court below. We measure whether Rule 26(B) was "firmly established and regularly followed by the time as of which it [was] to be applied." *Ford v. Georgia*, 498 U.S. 411, 423-24, 112 L. Ed. 2d 935, 111 S. Ct. 850 (1991) (quotations omitted). Although we did not decide this question directly in *White*, we did observe that "the state courts have not achieved consensus on what constitutes 'good cause' to excuse non-compliance with Rule 26(B)." *Id.* at 751. This was certainly true at, and even after, the time when Richey was required to file his motion to reopen under 26(B). *Cf. Mitchell v. Mason*, 325 F.3d 732, 739 (6th Cir. 2003) ("It is the Warden's burden to demonstrate that the rule was *already* firmly established and regularly followed as of the time the state court invoked the rule."). In some instances, the Ohio courts failed to excuse the most minor of violations caused by circumstances beyond the control of both the litigant and his lawyer. *See, e.g., State v. Winstead*, 74 Ohio St. 3d 277, 1996 Ohio 52, 658 N.E.2d 722 (Ohio 1996) (finding no good cause for a filing that was one day late, and that had resulted "because the overnight courier that appellant's counsel had used failed to deliver the application before the deadline for filing expired"). In other cases, the courts found good cause for significant violations even when no explanation whatsoever was provided by the litigant, solely because the litigant was proceeding *pro se*. *See, e.g., State v. Nitenson*, 1994 Ohio App. LEXIS 827, 1994 WL 69894 (Ohio Ct. App. Feb. 24, 1994) (finding good cause "in the interests of justice" even though "application

was filed more than one year after we journalized our affirmation of his conviction and he gives no sworn statements whatsoever in his application"). Nor were these inconsistent cases outliers in an otherwise consistent application of 26(B). *Compare, e.g.*, *State v. McCarter*, 1993 WL 107800 (Ohio Ct. App. Aug. 12, 1993); *State v. Klein*, No. 49260 (Ohio Ct. App. March 15, 1994); *with State v. Wright*, 1994 Ohio App. LEXIS 3374, 1994 WL 398805 (Ohio Ct. App. July 29, 1994); *State v. Fields*, No. 95 CA-08-048 (Ohio Ct. App. April 21, 1994). Thus, we find that Richey's challenge to the effectiveness of his appellate counsel is preserved. n8

> n8 Because we find that Rule 26(B) did not, in Richey's case, constitute an adequate state ground to deny his claims of ineffective assistance of appellate counsel, we do not reach the question whether ineffective assistance of appellate counsel could itself serve as the "cause" to excuse Richey's failure to comply with Rule 26(B). In *White v. Schotten*, 201 F.3d 743, 752-53 (6th Cir. 2000), we held that the 26(B) proceedings constituted part of the direct appeal - during which a defendant is constitutionally entitled to counsel - such that ineffective assistance of appellate counsel could serve as cause to excuse noncompliance with Rule 26(B). Although our decision in *Lopez v. Wilson*, 355 F.3d 931, 937-38 (6th Cir. 2004), cast doubt on whether *White*'s holding would survive the more deferential standard of review required by AEDPA, *Lopez* has since been vacated and *en banc* review is still pending. *See Lopez v. Wilson*, 366 F.3d 430 (6th Cir. 2004).

We now turn to the merits of Richey's ineffective assistance of counsel claim as an excuse for his procedural

default. The deficiency of Richey's trial and appellate counsel stems from the same shortcoming: that they failed to grasp that the State did not prove (and, indeed, had not even attempted to prove) that Richey specifically intended to cause the death of Cynthia Collins, as was required by the aggravated felony murder statute.

The failure to understand the elements of the charged offenses and hold the State to proving those elements is among the most basic responsibilities of competent counsel. "At the least, defense counsel in a criminal case should understand the elements of the offenses with which his client is charged and should display some appreciation of the recognized defenses thereto." *Scarpa v. DuBois*, 38 F.3d 1, 10 (1st Cir. 1994). The circumstances of Richey's case magnified counsel's obligation to understand the elements, because his conviction of aggravated felony murder subjected him not just to imprisonment, but to execution.

It would be one thing if counsel had failed to grasp a subtle question of statutory interpretation or had failed to raise an issue that would have been uncovered by only the most astute of jurists. However, as we explained above, at the time of Richey's trial and appeal - not the time of the Ohio Supreme Court's ruling - both the plain text of the Ohio Code and the judicial decisions interpreting it indicated that aggravated felony murder required specific intent, and that the doctrine of transferred intent was unavailable to the State. *See Prou v. United States*, 199 F.3d 37, 48 (1st Cir. 1999) ("Where, as here, an attorney fails to raise an important, obvious defense without any imaginable strategic or tactical reason for the omission, his performance falls below the standard of proficient representation that the Constitution demands."). Indeed, we have held that counsel can even be ineffective for failing to raise a legal claim that turns on an unresolved question of law, so long as counsel is aware that an unresolved issue exists. *See Combs v. Coyle*, 205 F.3d

269, 286 (6thCir. 2000) (resolving circuit split in defendant's favor, and then holding that counsel's failure to raise the objection was deficient because he "should have realized that the [practice at issue] was at least constitutionally suspect" -- as a result, "counsel's failure to have objected at any point is inexplicable, and we can perceive no possible strategic reason for such a failure"); *see also United States v. Bass*, 310 F.3d 321, 327-30 (5th Cir. 2002) (finding that appellate counsel was ineffective for failing to challenge sufficiency on direct appeal when defendant's conduct fell outside the statute). It follows with even greater force that when both text and precedent compelled the conclusion, and the conclusion would have gutted, as a matter of law, the primary charge and death sentence, counsel was deficient for failing to raise it.

Having established that both trial and appellate counsel were deficient, Richey must also demonstrate prejudice, a showing which is straightforward in this case. Because we have already determined that specific intent was clearly a requirement and the State failed to meet this requirement, Richey has demonstrated the necessary prejudice from the claimed violation of federal law. By failing to challenge the sufficiency of the evidence, trial counsel allowed the State to convict Richey and sentence him to death for a crime in which it had failed to satisfy one of the elements. Although the State may have been able to apply the doctrine of transferred intent for other crimes, such as felony manslaughter or perhaps even aggravated murder, the State chose to charge Richey with aggravated felony murder. At the time of the fire, the State could not convict someone of aggravated felony murder without proving that the defendant specifically intended to kill the person who was actually killed. Had Richey's attorneys presented a proper challenge of the application of transferred intent to subsection D of the statute, Richey could not have been constitutionally

convicted of aggravated felony murder, because the State did not prove Richey's specific intent to kill the victim. *Fiore v. White*, 531 U.S. 225, 228-29, 148 L. Ed. 2d 629, 121 S. Ct. 712 (2001). And by failing to raise this (and trial counsel's ineffectiveness) on appeal, appellate counsel again deprived Richey of dispositive relief. Richey was clearly prejudiced by his attorney's deficiencies. Thus, the procedural default of Richey's transferred intent/sufficiency claim is excused because of the ineffective assistance of both his trial and appellate counsel.

Because the Ohio Supreme Court considered the general claim regarding transferred intent, the state procedural rule did not constitute an independent, unreviewable state law ground; however, even if it did, the trial and appellate defaults were excused by cause (the result of ineffective assistance of trial and appellate counsel) and prejudice (inherent in the fact that we find the claim to be meritorious). In either case, Richey's claim was preserved for review.

B. Ineffective Assistance of Counsel

In a challenge that implicates his convictions on all charges, Richey also contends that his trial counsel was constitutionally ineffective in the way he handled his forensic expert and his failure to challenge the scientific evidence of arson. The State argues that this claim has been procedurally defaulted and disputes the claim on the merits.

1. Default

The State argues that this claim has been defaulted because Richey neglected to raise it on direct appeal. As the Ohio Supreme Court has explained, however, "any allegations of ineffectiveness based on facts not appearing in the [trial] record should be reviewed through the postconviction remedies." *State v. Coleman*, 85 Ohio St. 3d 129, 1999 Ohio 258, 707 N.E.2d 476, 483 (Ohio 1999). *See*

also Byrd v. Collins, 209 F.3d 486, 521 (6th Cir. 2000). As our analysis below will illustrate in detail, Richey's claims regarding his counsel's ineffective handling of the scientific evidence depend almost entirely on evidence outside the trial record: namely, (1) the testimony of DuBois, who explained trial counsel's limited oversight, supervision, and engagement; (2) the testimony of trial counsel, which illustrated the process (or lack thereof) by which he decided to hire DuBois, as well as his oversight (or lack thereof) over the course of DuBois's scientific investigation; and (3) the testimony of Custer and Armstrong, who explained the type and quality of scientific analysis that a reasonably competent expert would have performed at the time of Richey's trial. Thus, Richey was prohibited from raising these claims on direct appeal.

Instead, Richey was required to raise the claims during his postconviction challenge. He did so. During the postconviction proceedings, Richey argued that he was "wrongfully convicted on the basis of false scientific testimony because trial counsel unreasonably relied upon DuBois, failed to conduct an adequate investigation for a competent expert and failed to call an expert to rebut the State's false scientific testimony," and supported these claims with the statements of trial counsel, DuBois, Custer, and Armstrong. The state courts evaluated and decided the claim on the merits. *See Richey*, 1997 Ohio App. LEXIS 5284, 1997 WL at *3. We therefore may do the same.

2. Merits

As previously noted, *Strickland* requires that Richey demonstrate both deficient performance and resulting prejudice.

a. Deficient Performance

In order to show deficient performance, a defendant must show that counsel's representation "fell below an objective

standard of reasonableness." *Strickland*, 466 U.S. at 688. A "court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690. "In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Id.*

At the outset, the State, and the dissent to this opinion, argue that Richey has no constitutional right to the "effective assistance of an expert." The district court also noted that it was not unreasonable for trial counsel to "decline [to conduct] further expert-shopping once that expert rendered his opinion." Both might be true if trial counsel had done everything he was supposed to have done, and - through no fault of trial counsel - the expert had simply come up short. *See Skaggs v. Parker*, 235 F.3d 261, 268 (6th Cir. 2000) (defense expert's erratic and incoherent testimony during trial was not attributable to the failings of counsel given that the expert had been recommended by two colleagues and that counsel had used the expert before). But Richey argues, and the record reflects, that the failures of Richey's expert were largely caused by the failures of Richey's counsel. *See Bloom v. Calderon*, 132 F.3d 1267, 1277 (9th Cir. 1997) ("Counsel's failure to adequately prepare his expert and then present him as a trial witness [amounts to] constitutionally deficient performance."). As Richey's counsel observes, "incompetence cannot excuse incompetence."

First, trial counsel hired DuBois, based solely on a promotional flier that he happened to come across. DuBois was unqualified for the job because he worked primarily in another field, lacked training to do the job, and came into the litigation believing that the State's experts were more reliable than he was. Moreover, the minimal training he had received came from the very people whose conclusions he was being

hired to review. The dissent notes that "There is no suggestion in the record that counsel was put on notice that DuBois was either incompetent or unqualified to serve as Richey's expert." However, we have held that the deficiencies of an expert can be imputed to counsel when counsel has *failed* to adequately research and screen an expert witness. *See Glenn v. Tate*, 71 F.3d 1204, 1210 n.5 (6th Cir. 1995) (finding deficient performance because "we are not prepared to assume that Drs. Ramani and Siddal would have been the experts retained by the defense . . . if counsel had done their homework"). Thus, counsel owes more to his client than a passive duty to watch for red flags of incompetence.

Moreover, trial counsel waited two months after he was retained, and a full month after he received the State's scientific results, to contact and meet with DuBois. After their first meeting, he limited DuBois's initial investigation to ten hours--without any basis for doing so. *See Skaggs*, 235 F.3d at 270 (finding deficient handling of expert not excused "simply because counsel believed it would not be worth their time to request additional money from the court"); *Loyd v. Whitley*, 977 F.2d 149, 158 (5th Cir. 1992) (finding deficient performance when counsel "wrongly assumed that funds were unavailable and he abandoned what he knew to be an important pursuit"). After DuBois's stunted investigation, counsel waited another two months to meet with DuBois, who did no work in the interim.

Third, counsel failed to thoroughly inform DuBois about a critical problem with the State's scientific evidence--that the carpet had been housed in a garbage dump and on a parking lot located near gasoline pumps. *See Glenn*, 71 F.3d at 1210 ("Defense counsel should obviously have worked closely with anyone retained as a defense expert to insure that the expert was fully aware of all facts that might be helpful to the defendant."); *see also Affinito v. Hendricks*,

366 F.3d 252, 260 (3d Cir. 2004) ("When the key issue in a criminal case is whether the defendant suffered from a diminished capacity, we can think of nothing more critical than ensuring that the defense' psychiatric expert has as complete and accurate a description of the facts and circumstances surrounding the crime as possible. . . . [Failure to provide the expert with this information] was not a trial tactic, it was gross incompetence."); *Bloom*, 132 F.3d 1267 at 1273 (finding deficient performance when counsel possessed information that defendant had suffered extensive abuse as child, but counsel "failed to provide the information to Dr. Kling or to any other physician who examined [defendant]"). Although DuBois does not remember precisely what trial counsel told him, he did acknowledge that "I don't think [that counsel] told me the entire sequence of events involving the carpeting after the fire and before trial."

Fourth, trial counsel kept himself in the dark about all aspects of his expert's analysis. Counsel had no idea that DuBois, rather than performing his scientific tests or even conducting his own analysis of the test results, was essentially being spoon-fed the results by Gohar (who was the chief of the State Arson lab). Only after the trial did counsel learn that DuBois performed no testing or independent analysis; counsel had never bothered to instruct or simply ask DuBois about the investigation and analysis he had hired him to perform. Moreover, counsel did not ask for a written report from DuBois explaining his conclusions, nor did counsel ask DuBois about the bases for his conclusions, or even if the State's conclusions suffered from any flaws or gaps. Despite DuBois's endorsement of the State's forensic findings--which seriously damaged Richey's case--counsel, in DuBois's words, "was surprisingly nonargumentative with me [and] didn't challenge me on what I thought or why I thought what I did or anything."

Even though trial counsel was not a scientist, this should not relieve him of his responsibility to understand the evidence being used to convict and execute his client. Furthermore, aside from the presentation of testimony from his own expert, he would have to be sufficiently informed to cross-examine the State's experts. *See Dees v. Caspiri*, 904 F.2d 452, 455 (8th Cir. 1990) ("Counsel had a duty to garner the expertise necessary to cross examine [the State's expert]."). This responsibility was heightened here, given that the State called to the stand not only its own experts but also DuBois. *See Glenn*, 71 F.3d at 1210 ("We can only assume that defense counsel, not having done their homework, were not prepared to interrogate [their court-appointed experts]about the basis for the very damaging conclusions they stated."). That counsel was a lawyer, rather than scientist, should not have left him unable to comprehend even the basics of the science at issue. This is particularly so when the chain of custody, which is a legal issue, was critical to the reliability of the scientific evidence.

Fifth, trial counsel prematurely placed DuBois on his witness list and then failed to mitigate this mistake. Because trial counsel dragged his feet in hiring and debriefing DuBois, he had to put DuBois on his witness list before he was aware how DuBois would testify. *See Skaggs*, 235 F.3d at 270 (rejecting time-pressure as excuse for counsel's performance when the time pressure was itself caused by counsel's "waiting until the eleventh hour to prepare for the penalty phase and to line up a psychiatric expert to testify on [defendant's] behalf"). This became a problem, as once counsel decided against using DuBois, the State subpoenaed him to testify on its behalf. Nor, at this point, did counsel attempt to quash the subpoena or otherwise contest the testimony, or even cross-examine DuBois when he testified.

Finally, counsel failed to offer any competing scientific evidence. Of course, it is not always the case that "counsel

must continue looking for experts just because the one he has consulted gave an unfavorable opinion." *Dees*, 904 F.2d at 454. However, the testimony of Custer and Armstrong makes it clear that, even in 1986, a reasonably diligent attorney would have found witnesses to attack the State's conclusions. And "where there is substantial contradiction in a given area of expertise, it may be vital in affording effective representation to a defendant in a criminal case for counsel to elicit expert testimony rebutting the state's expert testimony." *Knott v. Mabry*, 671 F.2d 1208, 1213 (8th Cir. 1982). Nor was this a case in which counsel would have had to uncover an expert willing to spew junk science, because Armstrong and Custer both agreed that the scientific standards prevailing in 1986 would have seriously undermined the State's results, and both testified that they would have been available to apply such standards. *See Soffar v. Dretke*, 368 F.3d 441, 477 (5th Cir. 2004) ("As was made evident during the state habeas proceedings, . . . defense counsel would not have had to look far to find a ballistics expert who could have provided testimony to aid his defense.").

Instead, counsel adopted a defense that rendered Richey a sitting duck. Given the testimony of witnesses that Richey was upset at his ex-girlfriend and had made threatening comments, trial counsel's theory - that the fire was intentionally started by someone else - was doomed to fail. *See Foster v. Lockhart*, 9 F.3d 722, 726 (8th Cir. 1993) (presentation of alibi defense did not excuse counsel's failure to investigate possibility that defendant in rape case was impotent, given that"[defendant's] alibi defense was vulnerable" - "the vulnerability of the alibi defense shows the unreasonableness of the attorney's failure to investigate further and present the impotency defense"). And even if counsel had reasonably believed that this defense had merit, he could not have made an informed choice without reasonably investigating the alternatives. *See Soffar*, 368

F.3d at 474 ("An actual failure to investigate cannot be excused by a hypothetical decision not to use its unknown results.").

Trial counsel's failure to screen, supervise, or engage DuBois left Richey with little more than "a warm body with a prefix attached to his name," *Skaggs*, 235 F.3d at 273 n.3 (quoting *Ramdass v. Angelone*, 187 F.3d 396, 411 n.1 (4th Cir. 1999) (Murnaghan, J., dissenting)). In a case anchored by scientific evidence, the failure to subject this evidence to meaningful adversarial testing was woefully deficient. Moreover, we are unable to articulate any sound professional reason why counsel did not do so. The dissent argues that counsel was obligated to provide DuBois's name as a potential witness, and that the prosecution's use of the defense's expert does not violate the defendant's rights. While we agree that Richey's rights were not violated simply because the State used DuBois as its own witness, we believe that given the context here - where the defendant had a single expert witness who conducted no independent analysis and then became the witness for the other side without any cross-examination - there was a massive failure by trial counsel in his handling of the expert witness. Accordingly, we must conclude that counsel's performance was "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The state court's conclusion to the contrary was unreasonable.

b. Prejudice

We proceed to measure prejudice. In order to show prejudice, a defendant must demonstrate that "there is a reasonable probability that, but for counsel's errors, the factfinder would have had a reasonable doubt about his guilt." *Combs*, 205 F.3d at 290. "A reasonable probability is a probability sufficient to undermine confidence in the trial's outcome." *Foster*, 9 F.3d at 726. In determining whether

there was prejudice, we "must consider the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695. The prejudice inquiry is complicated slightly in this case because trial counsel's errors were twofold: deficiencies plagued both his hiring and handling of DuBois. Under either scenario, however, the evidence of prejudice is overwhelming.

Had counsel made the effort to find a qualified expert, rather than blindly hiring DuBois, the expert would have had the expertise and wherewithal to undermine the State's evidence that the fire was caused by arson. Custer and Armstrong highlighted a litany of irregularities in the State's scientific evidence. First, Custer revealed alternative explanations for the circumstances that led Cryer to finger arson as the culprit, and surmised that the fire was more consistent with an accidental outbreak. Second, Armstrong opined that "there is no evidence of an identifiable ignitable liquid in any of the samples from the fire scenes." Moreover, the blunders that Armstrong highlighted - the State's failure to use accepted methodology, use control groups, and eliminate other explanations, to name a few - would likely have led the factfinder to adopt the defense's understanding of the science.

Custer and Armstrong similarly explained, without refutation, that the scientific standards upon which they relied were widely accepted in 1986, leaving little doubt that counsel would have been able to find a competent expert had he bothered to look for one. *See Horsley v. Alabama*, 45 F.3d 1486, 1495 (11th Cir. 1995) ("To prove prejudice by failure to investigate and failure to produce a certain kind of expert witness, a habeas petitioner must demonstrate a reasonable likelihood that an ordinarily competent attorney conducting a reasonable investigation would have found an expert similar to the one eventually produced."). Indeed, both Custer and

Armstrong averred that they would have served as experts at the time, had they been contacted by counsel.

These experts' attacks on the State's evidence would have been all the more powerful given the absence of corroborating physical evidence. Neither Richey's clothing, boots, or bandage revealed the presence of accelerants. No empty cannisters of flammable liquids were found at or around the scene. And the owner of the neighboring greenhouse--from which the State theorized Richey stole the accelerants--was unable to determine whether anything was missing.

Furthermore, even if counsel's initial decision in hiring DuBois was proper, counsel's ineffective handling of DuBois resulted in prejudice to Richey. First, counsel's delays in hiring DuBois, and his arbitrarily limiting the hours that DuBois could work without understanding what type of work needed to be done in this case, made DuBois more dependent on the legwork of the State's experts, whose conclusions he was already predisposed to accept. Moreover, counsel's procrastination forced him to disclose DuBois as a potential witness before he knew whether doing so would benefit his client. The result was that the State was able to present not only the testimony of its own scientists, but also use Richey's own expert against him. *Cf. Bloom*, 132 F.3d at 1278 (finding prejudice when "[expert]'s report, which he now acknowledges was inaccurate, permitted the prosecution to turn Kling's trial testimony against [defendant]").

Second, trial counsel's failure to supervise DuBois left him unaware that DuBois was being spoon-fed results from the State, rather than conducting an independent analysis of the data. Counsel's failure to engage DuBois meant that possible deficiencies in the State's evidence were never explored, and also left him wholly unprepared to challenge the State's evidence or to cross examine his own expert as

later became necessary. *See Skaggs*, 235 F.3d at 274 (prejudice when "defense counsel failed to prepare or present any other meaningful mitigation evidence that might have compensated for their use of [an unqualified expert]").

Finally, trial counsel's failure to fully inform DuBois about the carpet samples' excursions at the garbage dump and parking lot deprived DuBois of all the information he needed to draw his conclusions, and made him more likely to agree with the conclusions of the State. Indeed, DuBois has subsequently indicated that his conclusions would likely have changed had he been fully informed about the chain of custody problems. *Bloom*, 132 F.3d at 1276 (finding prejudice from failure to disclose information to expert given that "had he been provided with this information at the time of his original evaluation, he would have altered his conclusions").

The record indicates that a competent arson expert--fully informed and supervised, and using the methods available to him at the time of trial--would have all but demolished the State's scientific evidence, and with it a large part of the case against Richey. *See Foster*, 9 F.3d at 722 (finding prejudice because "if the attorney had investigated further, he would have discovered objective medical evidence casting substantial doubt on the victim's story"). The State presented other evidence, of course, which demonstrated Richey's motive, means, and opportunity. But the prejudice inquiry is not the same as the sufficiency of the evidence analysis or the analysis that a court might perform when deciding a motion for summary judgment. As the Fifth Circuit has explained, we need *not* find "that a reasonable jury could not have reached the same verdict if counsel had performed effectively." *Johnson v. Scott*, 68 F.3d 106, 109 n.4 (5th Cir. 1995). Richey "need not show that he could not have been convicted. Instead, he need only undermine our confidence in the trial's outcome." *Foster*, 9 F.3d at 726.

Witnesses, moreover, are not always believed. Just as an alleged victim's testimony that the defendant had raped her became far less persuasive given evidence that the defendant was impotent and thus physically incapable of raping her, *see id.*, the testimony of Richey's acquaintances and Hope Collins, who had a motive to downplay her own responsibility for her daughter's death, would have been far more vulnerable to impeachment and skepticism absent evidence that the fire stemmed from arson. *See also Combs*, 205 F.3d at 290 (finding prejudice from defense counsel's mishandling of scientific evidence of defendant's mental capacity for acting with "purpose and intent," even though "the State presented other evidence of [defendant]'s purpose and prior calculation and design"); *Baylor v. Estelle*, 94 F.3d 1321, 1324-25 (9th Cir. 1996) (finding prejudice from defense counsel's failure to pursue evidence that semen found at scene of the first of a series of rapes did not come from defendant, even though defendant had made detailed confession to the rapes); *cf. United States v. Tarricone*, 996 F.2d 1414, 1419 (2d Cir. 1993) (finding prejudice from defense counsel's failure to pursue exculpatory handwriting evidence, even though there was other circumstantial evidence of defendant's guilt).

Accordingly, we find that counsel's incompetent handling of the sole forensic expert in this case fell far below the wide range of acceptable professional standards, and that absent counsel's grave mistakes, there is a reasonable probability that the three-judge panel would have at least had a reasonable doubt as to whether Richey set the fire that ultimately caused the death of Cynthia Collins.

III. CONCLUSION

Because our holdings above entitle Richey to all the relief that he has sought, we do not consider or decide his other claims. The district court's judgment is REVERSED, and the

case is REMANDED with instructions that a conditional writ of habeas corpus, giving the State of Ohio ninety days to attempt to retry Richey or release him from custody, be GRANTED.

SILER, Circuit Judge, dissenting. I respectfully dissent from the majority's conclusions that there was insufficient evidence against Richey on the charge of aggravated felony murder, that this issue was not procedurally defaulted, and that trial counsel was ineffective in his handling of his expert witness, DuBois.

The first issue, insufficiency of the evidence, due to the fact that Richey could not have been sentenced to death for the aggravated felony murder charge under Ohio Revised Code § 2903.01 through transferred intent, is procedurally defaulted. As the majority opinion states, Richey has conceded that he did not raise this claim at trial or on direct appeal. The district court correctly found that this issue was procedurally defaulted. As it said: "Richey did raise an insufficiency of evidence claim to the Ohio Supreme Court, although that claim asserted only that his conviction rested on solely circumstantial evidence." The Ohio Supreme Court discussed transferred intent only as a sub-issue under the issue of circumstantial evidence. *See State v. Richey,* 64 Ohio St. 3d 353, 1992 Ohio 44, 595 N.E.2d 915, 925 (Ohio 1992). Transferred intent is not one of the issues listed in the certificate of appealability. To the contrary, the district court denied a certificate of appealability on this issue, and we did the same. Therefore, the question of transferred intent can only be approached by this court as a subpart of the certified issue on appeal of the ineffective assistance of appellate counsel either by the failure of appellate counsel to raise the question on direct appeal, or the failure of appellate counsel to raise the question of ineffective assistance of trial counsel

for his failure to argue the issue of transferred intent before the trial court.

As the district court correctly found, this assertion is in the nature of a faulty indictment claim, which must be raised prior to trial under Ohio Rule of Criminal Procedure 12. Of course, Richey gets around that barrier by asserting that the Ohio Supreme Court reached the issue of transferred intent, but it was part of its ruling on the sufficiency of the evidence, not as a separate issue. Nevertheless, the majority has accepted Richey's argument of skirting the procedural default by finding that trial counsel was ineffective for failing to challenge the sufficiency of the evidence under this transferred intent issue, and that appellate counsel was ineffective for failing to raise the ineffectiveness of trial counsel on that point. However, that issue was also procedurally defaulted, because of the failure by Richey to timely reopen his appeal in the Ohio courts under Ohio Rule of Appellate Procedure 26(B), as the Ohio Supreme Court held that the motion was untimely. Nevertheless, assuming that it was not barred by an untimely application under Rule 26(B), as the district court found, I would still find that there was no ineffective assistance of appellate counsel for failing to raise the ineffective assistance of trial counsel on this point of transferred intent. The reason for my conclusion is simple. The Ohio Supreme Court found that the doctrine of transferred intent applied in this case when it said "' the doctrine of transferred intent is firmly rooted in Ohio law.'" *Richey*, 595 N.E.2d at 925 (quoting *State v. Sowell*, 39 Ohio St. 3d 322, 530 N.E.2d 1294, 1305 (1988)). It held that the doctrine of transferred intent was applicable under Ohio Revised Code § 2903.01(B). Therefore, had counsel raised the issue before the trial court and preserved it on appeal, the issue would have been lost before the Ohio Supreme Court.

The majority admits that the Ohio Supreme Court ruled that transferred intent is applicable under the charge in this

case. However, it has essentially eviscerated the power of the Ohio Supreme Court to interpret its own statutes. It relies upon the language from *State v. Mullins*, 76 Ohio App. 3d 633, 602 N.E.2d 769, 771 (Ohio Ct. App. 1992). However, the language quoted from *Mullins* is *dictum*, for the holding was that the doctrine of transferred intent applied in a case where the defendant was charged under Ohio Revised Code § 2903.02(A). Obviously, the Ohio Supreme Court did not feel bound by it, not only because it was *dictum* but it came from a lower court. Instead, the Ohio Supreme Court interpreted the *Sowell* case and found that transferred intent had always applied in similar cases.

The majority correctly states that the scope of review under AEDPA requires that we uphold the decision of the Ohio Supreme Court unless it: (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). I am not certain on which of these prongs the majority has anchored its decision, but it seems to be that it was contrary to or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court. It cites *Fiore v. White*, 531 U.S. 225, 228-29, 148 L. Ed. 2d 629, 121 S. Ct. 712 (2001), which held that a state criminal conviction violates the Due Process clause of the Fourteenth Amendment when a person is convicted of a crime when the elements of the crime have not been proven beyond a reasonable doubt. In *Fiori*, the crime for which the defendant was convicted was the failure to possess a permit for the operation of a hazardous waste facility. The Commonwealth agreed that it had not proven that basic element. To the contrary, in this case at bar, the State met its burden to prove intent through the doctrine of

transferred intent, which was the law in Ohio at the time of this crime, as interpreted by the Ohio Supreme Court.

The majority also relies upon *Bouie v. City of Columbia*, 378 U.S. 347, 351, 12 L. Ed. 2d 894, 84 S. Ct. 1697 (1964), for the proposition that the Ohio Supreme Court could not retroactively expand the criminal act prohibited under Ohio law. However, the Ohio Supreme Court held that its decision in this case followed the law which had been in Ohio for many years preceding Richey's conviction. Therefore, the Ohio Supreme Court's ruling on transferred intent was neither contrary to nor involved an unreasonable application of clearly established Federal law as determined by the Supreme Court. From *Williams v. Taylor*, 529 U.S. 362, 411, 146 L. Ed. 2d 389, 120 S. Ct. 1495 (2000), under the "unreasonable application" clause,

> a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

I suggest that the Ohio Supreme Court did not make any unreasonable application of clearly established Federal law here, nor was it contrary to *Fiori* or *Bouie*. It is best to leave it up to the Ohio Supreme Court to decide the application of its own laws, so long as it does not do so unconstitutionally. *Cf. Mitchell v. Esparza*, 540 U.S. 12, 17, 157 L. Ed. 2d 263, 124 S. Ct. 7 (2003) ("A federal court may not overrule a state court for simply holding a view different from its own, when the precedent from this Court is, at best, ambiguous."). Thus, appellate counsel was not ineffective for not raising ineffective assistance of trial counsel on this issue.

I also respectfully disagree with the majority on its conclusion that Richey was deprived of the effective assistance of counsel at the guilt phase of his trial. The Ohio Court of Appeals found that counsel was not ineffective under *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). *State v. Richey,* 1997 Ohio App. LEXIS 5284, 1997 WL 722782, at *3 (Ohio Ct. App. 1997). Therefore, because it correctly identified *Strickland* as the authoritative case governing Richey's claim, we must decide whether its application of the *Strickland* standard was "objectively unreasonable." *Williams*, 529 U.S. at 409. It is Richey's "burden to show that the state court applied *Strickland* to the facts of his case in an objectively unreasonable manner." *Woodford v. Visciotti*, 537 U.S. 19, 25, 154 L. Ed. 2d 279, 123 S. Ct. 357 (2002) (*per curiam*).

I agree with the majority that this issue is not procedurally defaulted, due to the fact that the Ohio Court of Appeals ruled on it and the circumstances of this claim depend on evidence outside the trial record. However, I disagree with the majority on the issue of deficient performance, so I do not discuss the question of prejudice as an alternative basis except for one minor point. The majority finds several errors amounting to ineffective assistance on the selection and use of the expert witness, DuBois. The majority concludes that DuBois was unqualified for several reasons. However, in *Skaggs v. Parker*, 235 F.3d 261, 272 (6th Cir. 2000), we noted that a claim "that the petitioner is entitled to a competent expert in his defense," has never been "explicitly adopted by this Court." *Accord Campbell v. Coyle*, 260 F.3d 531, 550-51 (6th Cir. 2001). The record does not support Richey's allegation that counsel retained DuBois without performing an adequate background check. Richey makes much of DuBois's academic inexperience in the fields of forensic science and fire investigation, but it appears that his in-class training consisted of courses in fire investigation

taught by members of the Ohio Fire Marshal's Office, the very entity he was hired to critique. There is no suggestion in the record that counsel was put on notice that DuBois was either incompetent or unqualified to serve as Richey's expert. The majority infers that it was wrong to find him through a promotional flier, but that does not disqualify an expert. After counsel contacted DuBois and discussed some of the facts of the case, DuBois sent a follow-up letter explaining the services he and his employer would provide. The letter included the fact that his business would "investigate the cause and origin of a fatal apartment fire." It would "include a visit to the fire scene, review of available information and reports, and a preliminary report of our findings." He also estimated that he could do it in ten hours. DuBois listed his company's services, which included fire and explosions investigations. Nothing in his resume or company profile indicated that he was either incompetent or unqualified to serve as an expert. Moreover, DuBois indicated that his company was involved in approximately 400-500 fire investigations prior to 1987 and he played some role in almost all of them. In 1986 alone, DuBois was involved in 10-30 arson investigations. Based on the foregoing, it cannot be said that the decision to hire DuBois was "objectively unreasonable" pursuant to *Strickland*. Although his classroom training in forensic science and fire investigation was fairly limited, counsel could not have been on notice of such limitations, and any academic inadequacies seemed to have been compensated for with practical field experience. Obviously, there may have been experts out there somewhere who were better qualified, but the law does not require counsel to search throughout the world to find the best expert in the field and hire him. *See Sidebottom v. Delo*, 46 F.3d 744, 753 (8th Cir. 1995).

The majority also finds fault in counsel's delay in meeting with DuBois and limiting the initial investigation to

ten hours. However, these sub-claims were never raised in State court, so they were procedurally defaulted. Even if these sub-issues were not procedurally defaulted, the claims cannot prevail on the merits. Although counsel's delay in providing DuBois with the State's scientific report and data prevented DuBois from conducting an independent test of the extracts, Richey has not argued that counsel knew of or should have known of the short lifespan of the extracted compounds. This is not a situation where an attorney was aware of a particular risk and ignored it; rather, this is a situation where only with the benefit of hindsight that counsel's delay could have been harmful. The Supreme Court has warned that "every effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. Moreover, Dr. Armstrong testified that his review of the data suggests that there were no extracts available to be tested following the State's initial test. That is, the State's original tests used up all the extracts. Thus, regardless of how soon counsel could have insisted that DuBois conduct his own tests, no tests could have been performed. Richey has not alleged that the State violated any laws in the course of conducting the tests. Furthermore, the fact that extracts were not available in this case did not prevent Dr. Armstrong from later rendering an opinion as to the accuracy and validity of the State's tests.

The limitation of ten hours for the work of the expert shows nothing. Richey has not shown prejudice under *Strickland*. DuBois testified that he spent more than ten hours on the case and his biggest limitation was not being able to see the fire scene carpeting, which was not the result of counsel's alleged ineffectiveness.

The majority also criticizes counsel's failure to inform DuBois about the fact that the carpet was removed from a

dumpster on a parking lot located near gasoline pumps. But DuBois was ambiguous about this. In his deposition, he said he probably knew it. He also said:

> I do recall [counsel] told me that the carpeting had been thrown out and - I probably misstated whether or not he told me it had been sampled and then thrown in the dumpster or thrown in the dumpster then sampled. But I did know that there was some questionable handling of the carpeting after the fire, and [counsel] was rather upset about it.

Counsel also raised this at trial. Therefore, it is unclear whether counsel withheld this information from DuBois. Thus, Richey has not carried the burden to show this conduct to be objectively unreasonable behavior.

Next, the majority criticizes the fact that trial counsel placed DuBois on his witness list and then failed to mitigate the mistake. Although counsel did not have DuBois's report, he was obligated to disclose the name of this witness under the Ohio Criminal Rules. He had a tactical reason for disclosing the name of the expert, so he was not ineffective by making such a disclosure. Morever, counsel was not ineffective for failure to quash the subpoena or otherwise contest his testimony. The Ohio Supreme Court discussed the underlying merits of that issue. *See Richey,* 595 N.E.2d at 922-23. It indicated that the prosecution's use of a defense expert does not violate the rights of an accused, unless there is a disclosure of confidential communications between the attorney and the client. In this case, there were no such problems. Therefore, any objection or attempt to quash the subpoena would have been unsuccessful. If counsel was thinking of the possibility of calling DuBois as a witness, he had to list his name, even when he did not yet have DuBois's

report. Otherwise, had DuBois filed a report favorable to Richey, counsel may not have been able to use DuBois.

Finally, the majority criticizes counsel for failing to offer any competing scientific evidence or to screen, supervise, or engage DuBois. However, counsel does not have a duty to "continue looking for experts just because the one he has consulted gave an unfavorable opinion." *Dees v. Caspiri*, 904 F.2d 452, 454 (8th Cir. 1990) (per curiam). Unless a defense attorney has reason to doubt the objectivity of an expert, the failure to obtain a new "impartial" expert will not be objectively unreasonable. *See Jones v. Murray*, 947 F.2d 1106, 1112 (4th Cir. 1991). DuBois reviewed the results of the tests from the State's expert and agreed with them. There was nothing to indicate to counsel that the results were not correct. The Supreme Court has indicated that post-AEDPA claims of ineffective assistance of counsel will succeed only in limited circumstances. In *Bell v. Cone*, 535 U.S. 685, 152 L. Ed. 2d 914, 122 S. Ct. 1843 (2002), the Court stated:

> For [petitioner] to succeed, however, he must do more than show that he would have satisfied *Strickland's* test if his claim were being analyzed in the first instance, because under § 2254(d)(1), it is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied *Strickland* incorrectly. Rather, he must show that the ... Court ... applied *Strickland* to the facts of his case in an objectively unreasonable manner.

Id. at 698-99 (internal citations omitted). Richey has not done that here. Therefore, I would not find that the decisions of the Ohio courts were contrary to or unreasonable applications of Federal law as interpreted by the Supreme

Court. Thus, I would affirm the decision of the district court in denying the petition for a writ of habeas corpus.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 01-3477

KENNETH T. RICHEY,
Petitioner-Appellant,
v.
BETTY MITCHELL,
Warden, Respondent-Appellee

April 15, 2005, Filed

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BEFORE: SILER, DAUGHTREY, and COLE, Circuit Judges.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active * judges

of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

* Judge Cook recused herself from participation in this ruling.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Siler would grant rehearing for the reasons stated in his dissent. The panel has added the sentence "The state court's conclusion to contrary is unreasonable" to the paragraph before Part III. Conclusion on page 22 of the opinion.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Kenneth T. Richey,	)	CASE NO. 1:98 CV 1418
	)	
Petitioner,	)	JUDGE PATRICIA A.
	)	GAUGHAN
vs.	)	
	)	Memorandum of Opinion
Betty Mitchell, Warden,	)	and Order
	)	
Respondent.	)	

This matter is before the Court upon petitioner Kenneth Richey's Petition for Writ of Habeas Corpus (Doc. I). For the following reasons, the Petition is DENIED.

Introduction

Petitioner, Kenneth Richey, acting pursuant to 28 U.S.C. § 2254, filed a Petition for Writ of Habeas Corpus challenging his conviction and sentence of death rendered by an Ohio court. The respondent, Betty Mitchell, Warden, filed a timely Return of Writ and petitioner filed a Traverse. For the following reasons, the Petition for Writ of Habeas Corpus is denied.

I. Factual History

On July 10, 1986, a Putnam County Court of Common Pleas Grand Jury issued a five-count indictment against petitioner: aggravated murder in violation of Ohio

Revised Code § 2929.02 with a felony-murder death penalty specification in violation of Ohio Revised Code § 2929.04(A)(7); aggravated arson in violation of Ohio Revised Code § 29290.2(A)(1); breaking and entering in violation of Ohio Revised Code § 2911.13(A); involuntary manslaughter in violation of Ohio Revised Code § 2903.04(A); and child endangering in violation of Ohio Revised Code § 2919.22(A). (Respondent Ex. 1).

Petitioner originally entered pleas of not guilty by reason of insanity on July 14, 1986. (Respondent Ex. 2). The court ordered a psychiatric evaluation to evaluate petitioner for sanity at the time the crimes were committed arid competency to stand that. (Respondent Ex. 3). After several pre-trial motions, petitioner waived the right to a jury trial and chose to be tried by a three-judge panel. (Respondent Ex. 17). He also withdrew his plea of not guilty by reason of insanity.

The Ohio Supreme Court set out the following factual history, as adduced by the evidence presented at trial, upon considering petitioner's direct appeal of his convictions and sentence:

> Around 4:15 a.m., on June 30, 1986, in Columbus Grove, Ohio, a raging fire broke out in Hope Collins's [sic] second-floor apartment, killing Cynthia Collins, Hope's two-year-old daughter. Less than an hour before, Hope had left her apartment after Kenneth T. Richey, defendant-appellant, agreed to baby-sit Cynthia. Circumstantial evidence established that while in Hope's apartment, Richey had spread gasoline and paint thinner around the apartment and ignited it.
>
> Richey, Hope, Peggy Price, Candy Barchet, Richey's ex-girlfriend, and a variety of other witnesses to these events lived at the Old Farm Village Apartments in

Columbus Grove. Peggy and Hope lived in adjacent second-floor apartments, and Candy lived directly below Hope. All three apartments were in Building or Section "A" at Old Farm Village. Candy and her infant son moved into their apartment around June 15 and she met Richey. Within a few days, Candy and Richey formed a sexual relationship, and Richey frequently told Candy he loved her and "would kill any other guys" she was with.

On June 24, Richey learned that Candy had just been in bed with John Butler, and Richey pulled a knife on Butler. In response, Butler "bounced him around the room a little bit." Just after that fracas, Richey broke his hand by punching a door, requiring a splint.

On Sunday evening, June 29, Candy took her new boyfriend, Mike Nichols, to a party in Peggy's apartment; during the party, Candy kissed Nichols openly and told Richey that she wanted to date Nichols. Richey became upset at this news. When Candy went home, around 1:00 am., she asked Nichols to spend the night with her, which he did.

That night, Richey wore his Marine Corps camouflage fatigues and combat boots, and he still had his right hand bandaged in a splint. Some witnesses reported Richey was intoxicated. Jeffrey Kezar recalled Richey saying. "If can't have her [Candy], nobody else can."

Richey told several persons that Building "A" would burn that night and he would use his Marine training to do that. Robert Dannenberger described Richey as "very upset" and said Richey threatened to blow the place up since he had "learned how to do explosives"

in the Marines. Peggy Price became upset, and Richey told her, "Well, instead of blowing it up, I'll torch A Section." Price recalled that Richey said, "Before the night is over, part of A Building is going to burn down." Shirley Baker also recalls Richey saying. "A Building was going to burn * * 'I*'' Juanita Altimus, while just outside of her own apartment, overheard Richey say on the landing, "Building A was going to burn tonight."

By 2:00 am., the party was breaking up, and Richey kept asking Hope if he could spend the night on her sofa. Hope refused. Around 2:20 a.m., June 30, Richey offered to steal some flowers for Peggy from a greenhouse across the street, but Peggy told Richey not to bring them to her.

Between 3:00 and 3:30 am., Dennis Smith drove up and asked Hope to go with him. Hope replied she did not have a baby-sitter, but Richey said, "Well, I'll keep an eye on her [Cynthia], if you'll let me sleep on your couch." A neighbor also overheard Hope say to Richey, "Go upstairs with Scootie [Cynthia's nickname] – she's asleep – but don't lock the door because I can't get back in because I don't have a key."

Around 4:15 am., neighbors reported bright orange flames and smoke coming out of the Collins apartment, and the fire department responded. Firemen saw several feet of flames from the apartment and deck curl up over the roof. A resident and a fireman both started into the apartment, but the heat and fire were too intense. A fireman then went back in, with oxygen, but he could not find Cynthia and soon ran out of oxygen.

Ultimately, several firemen, with fire hoses and oxygen masks, succeeded in removing Cynthia's body from her burning bedroom. Cynthia died from asphyxia related to smoke inhalation.

When the firemen arrived, Richey was either at the Collins apartment or he arrived shortly thereafter; he was screaming that a child was still inside. One fireman saw him coming out of the apartment, helped him up, and had to restrain him to keep him from going back in. Richey was combative, argumentative, and interfered with efforts to fight the fire and rescue Cynthia. Two deputy sheriffs overpowered Richey and turned him over to Police Chief Thomas Miller to keep him out of the way.

During the fire, Richey asked Nichols, "Why don't we finish it now, since you think you're so bad[?]" Richey also asked Candy if the fire had scared her. When she replied it had, Richey told her, "if he couldn't have me, that nobody would * * *." Altimus reported that Richey, as he looked over the fire damage, drank a beer, laughed, and said, "It looks like I did a helluva good job, don't it."

Richey admitted that he had earlier gotten two plants from K & J Greenhouse for Candy, and police found those plants outside Candy's apartment. The K & J owner identified them as having been stolen from his greenhouse. Richey had also offered to steal two plants for Peggy that evening. The K & J owner confirmed that paint thinner and gasoline were kept in two unlocked storage sheds. Gasoline and paint thinner could have been stolen from these sheds; the owner did not know if any was missing.

Assistant State Fire Marshal Robert Cryer concluded from the physical evidence and burn patterns that an accelerant had been used. An accelerant had been poured on the apartment's wooden deck, the fire's point of origin, as well as the living room rug. A smoke detector had been pulled from the ceiling before the fire. The fire was a very fast, hot, intense fire because of the accelerant.

Gregory DuBois, a consulting engineer, agreed that the fire had been caused by arson and that accelerants had been used. One rug sample from the Collins apartment contained gasoline, and another rug sample revealed paint thinner. Wood chips from that apartment's deck also contained paint thinner. However, laboratory tests failed to reveal any accelerants on Richey's fatigues or boots.

Chief Miller interviewed Richey as a witness on the morning of June 30 and also obtained his statement in the afternoon after advising him of his rights. By July 1, the investigation had focused on Richey, and police arrested Richey for arson and took further statements after advising him of his rights. Police tape-recorded an interview of Richey on July 1. Fire Marshal Cryer and Assistant Prosecuting Attorney Randy Bassinger participated in that interview.

In these statements, Richey maintained that he had been drunk on June 30 and did not remember much. However, he denied starting the fire or knowing how it started. He also denied that Hope had asked him to baby-sit Cynthia, and claimed that he had been at his father's apartment when the fire began. Richey did admit that he knew Cynthia was in Hope's apartment;

> he had stopped and looked in on her while she was sleeping during the party. Richey also claimed that he had secret ways with witnesses so they would not testify against him. In a later statement, he said he would cut the prosecutor's throat.
>
> * * * A panel of three judges convicted Richey of all charges, save the manslaughter charge, which was dropped. Following a presentence investigation, mental evaluation, and mitigation hearing, the panel sentenced Richey to death for aggravated murder and consecutive prison terms for the other offenses.

State v. Richey, 595 N.E.2d 915, 918-920 (Ohio 1992).

II. Procedural History

Petitioner, represented by new counsel, Ken Murray and Jane P. Perry, from the Ohio Public Defender's Commission, filed a timely direct appeal of the trial court judgment to the Third District Court of Appeals setting forth twenty-two assignments of error.[1] (Respondent Ex. 47).

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[1] The assignments of error are as follows:

> 1. Ohio's multiple counts statute, Ohio Revised Code § 2941.25, was violated when appellant was sentenced for both aggravated murder and aggravated arson, thereby denying appellant his statutory and constitutional double jeopardy and due process protections.
>
> 2. Ohio's multiple count statute, Ohio Revised Code § 2941,25, was violated when appellant was sentenced for both aggravated murder and child endangering, thereby denying appellant his statutory and

constitutional double jeopardy and due process protections.

3. A death sentence based upon a sole aggravating circumstance which merely duplicates an element of the underlying crime is violative of Eighth and Fourteenth Amendments to the United States Constitution and Section 9, Article I, of the Ohio Constitution.

4. The State's circumstantial evidence was insufficient, as a matter of law, to prove every essential element of the capital crime with which he was charged. Because appellant's capital conviction was based on insufficient evidence, he was deprived of the due process of law guaranteed by the Fourteenth Amendment to the United States Constitution and Section 16, Article I of the Ohio Constitution, and his conviction must be vacated.

5. Appellant's conviction of the capital offense was against the weight of the evidence. In the interest of justice, that conviction must be vacated.

6. The trial court erred when it permitted the assistant state fire marshal to testify as to two exhibits which the state failed to prove the chain of custody. The court further erred when it permitted those exhibits to be admitted into evidence, in violation of Appellant Richey's rights under the Fifth and Fourteenth Amendments to the United States Constitution and Sections 10 and 16, Article I, of the Ohio Constitution.

7. The sentence of death imposed on Appellant

Richey was unreliable and inappropriate. The death sentence in Appellant's case violated the Eighth and Fourteenth Amendments to the United States Constitution and Sections 10 and 16, Article I, of the Ohio Constitution.

8. The death sentence in Appellant Richey's case was excessive and disproportionate, thereby resulting in the arbitrary and capricious imposition of the death penalty in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Section 9, Article I, of the Ohio Constitution.

9. The trial court's failure to consider Appellant's mitigating evidence in its sentencing determination was contrary to Ohio Revised Code § 2929.04(B)(7), the Eighth and Fourteenth Amendments to the United States Constitution and Section 9, Article I, of the Ohio Constitution.

10. It was error to include in Appellant's pre-sentence report material suppressed at trial as irrelevant to aggravation or mitigation, victim impact statements and unverified or inaccurate information. The report also introduced for the sentencer's consideration the non-statutory aggravating circumstance of appellant's future dangerousness. This deprived appellant of his right to a fair trial guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and undermined the reliability in capital sentencing required by the Eighth and Fourteenth Amendments to the United States Constitution and Section 9, Article 1, of the Ohio Constitution.

11. The trial court erred in failing to state its essential

factual findings on the record when it overruled appellant's motion to suppress as required by Criminal Rule 12(E), violating his rights as guaranteed by the Eighth and Fourteenth Amendments of the United States Constitution.

12. The trial court erred in denying Appellant's motion to suppress statements. The statements were not obtained in accordance with the rule espoused in *Miranda v. Arizona*, and violated Appellant's privilege against self-incrimination as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Section 10, Article I, of the Ohio Constitution.

13. The trial court's failure to sever count three of the indictment against Appellant Richey prejudiced his right to a fair trial guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Section 10, Article I, of the Ohio Constitution, constituted abuse of the trial court's discretion, and requires reversal of Appellant's convictions.

14. The unmistakable pattern of substantial misconduct during the closing argument of the guilt phase of Appellant's trial induced the panel to convict and sentence to death according to factors which were irrelevant and highly prejudicial. The misconduct violated Appellant's rights to due process, equal protection, fair trial and against cruel and unusual punishment.

15. The improper introduction of other acts as evidence in the guilt phase of Appellant's capital trial

violated Evidence Rule 404(b) and Ohio Revised Code § 2945.59. The misuse of this evidence deprived Appellant of the reliability and fairness in a capital trial required by the Eighth, Sixth, and Fourteenth Amendments to the United States Constitution and Sections 9, 10 and 16, Article I, of the Ohio Constitution.

16. The trial court abused its discretion by denying defense counsel's motion to admonish and sequester witnesses. This denial deprived Appellant of his right to a fair trial and the right to be free from the infliction of cruel and unusual punishment as required by the Fourteenth and Eighth Amendments respectively.

17. The State's failure to record the grand jury proceedings in Appellant Richey's case violated the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and Sections 9, 10, and 16, Article I, of the Ohio Constitution.

18. The trial court erred in failing to keep a complete record of all proceedings throughout the guilt and mitigation phases of Appellant's trial by allowing unrecorded sidebars, and by failing to have the view of the crime scene recorded. These failures violated Appellant's rights as guaranteed by the Fourteenth Amendment to the United States Constitution, Section 16, Article I, of the Ohio Constitution, and Section § 2929.05 of the Ohio Revised Code.

19. Appellant was denied the effective assistance of counsel in his capital trial as guaranteed by the Sixth and Fourteenth Amendments to the United States

The appellate court affirmed the trial court's judgment, overruling petitioner's assignments of error. *State v. Richey*, No. 12-87-2, 1989 WL 156562 (Ohio Ct. App. Dec. 28. 1989). In a separate opinion, the Third District Court of Appeals re-weighed and affirmed the sentencing decision of the trial court. *State v. Richey*, No. 12-87-2, 1989 WL

Constitution and Section 10, Article I of the Ohio Constitution.

20. Ohio's mandatory sentencing scheme prevented the three judge panel from deciding whether death was the appropriate punishment in violation of Appellant's rights as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and Sections 9 and 16, Article I, of the Ohio Constitution.

21. The trial court erred in imposing the death sentence of Appellant Richey. The Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Sections 2, 9, 10 and 16, Article I, of the Ohio Constitution, establish the requirements for a valid death penalty scheme. Ohio's statutory provisions governing the imposition of the death penalty, contained in 2903.01, 2929.02., 2929.021, 2929.022, 2929.023, 2929.03, 2929.04 and 2929.05 do not meet the prescribed requirements and, thus, are unconstitutional, both on their face and as applied to Kenneth Richey.

22. Appellant's right to the effective assistance of counsel was violated when the State called as a witness, during its case-in-chief, a defense-retained expert.

156561 (Ohio Ct. App. Dec. 28, 1989). Petitioner, represented by Jane P. Perry and Kevin L. Fahey of the Ohio Public Defender Commission, directly appealed to the Ohio Supreme Court, raising twenty-three propositions of law.[2] (Respondent Ex. 53). The Ohio Supreme Court

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[2] These propositions of law are as follows:

> 1. The introduction of testimony that the capital defendant has threatened the prosecutor and witnesses in his case, which testimony is irrelevant to any issue of consequence in the case and irrelevant to any of the proper purposes under Ohio Revised Code § 2945.59 and Evidence Rule 404(B), destroys the reliability and fairness in a capital trial required by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Sections 9, 10 and 16, Article I of the Ohio Constitution.
>
> 2. When the judges who are triers of facts in a capital case are persuaded to act on information that the defendant is a dangerous person and a subverter of the criminal justice system, the defendant is denied his rights to a fair trial and fair and impartial judges under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.
>
> 3. When the presentence report in a capital [sic] contains material that (1) has been suppressed at trial as irrelevant to aggravation or mitigation (2) is a non-statutory aggravating circumstance and (3) exposes the judges to information which jeopardizes the appearance of fairness and fairness itself, the capital defendant is denied his rights to due process, a fair trial and a fair and reliable sentencing determination as guaranteed by the Fifth and Fourteenth

Amendments to the United States Constitution and Article I, Section 16 of the Ohio Constitution and undermined the reliability in capital sentencing required by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Sections 9, 10 and 16, Article I, of the Ohio Constitution.

4. Absent compelling justification or waiver, it is improper for the prosecution to use testimony from a defense expert in the state's case-in-chief. Such a practice denies the defendant his rights to a fair trial and the effective assistance of counsel as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

5. The Sixth, Eighth and Fourteenth Amendments to the United States Constitution guarantee the accused's rights to a fair trial and to not be subject to prosecutorial misconduct. Appellant Richey was denied those rights as a result of prosecutorial misconduct in the guilt phase of his capital trial.

6. When the state fails to show with reasonable certainty that physical evidence offered at trial is in substantially the same condition as it was at the time of the crime. The admission of such evidence violates the capital defendant's right to due process, a fair trial and a reliable guilty verdict under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Section 9, 16, Article I, of the Ohio Constitution.

7. Convictions based on circumstantial evidence which is not sufficient to prove every element of the

charged crimes beyond a reasonable doubt violate the capital defendant's rights as guaranteed by the Fourteenth Amendment to the United States Constitution and Section 16, Article I of the Ohio Constitution.

8. The Sixth, Eighth and Fourteenth Amendments guarantee the accused's rights to a fair trial and a reliable determination of guilt in a capital case. The trial court's failure to take steps to minimize the risk of collusion among state's witnesses denied Appellant Richey those rights.

9. Statements obtained in violation of *Miranda v. Arizona*, and the underlying privilege against self-incrimination as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Section 10, Article I, of the Ohio Constitution are not admissible in the State's case-in-chief. Further, statements taken without *Miranda* warnings and notice to counsel after counsel has been appointed violated the right of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Section 10, Article I, of the Ohio Constitution are equally inadmissible in the State's case-in-chief.

10. The failure to sever for trial a count which is not proved to be related to the capital charge for which the defendant is on trial and is used merely to bolster a weaker case on the capital charge denies the capital defendant his right to due process and a fair trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Section 10 and 16, Article I, of the Ohio Constitution.

11. Sentences for both aggravated murder and aggravated arson violate Ohio Revised Code § 2941.25, the Fifth and Fourteenth Amendments to the United States Constitution and Section 10 and 16, Article I, of the Ohio Constitution.

12. Sentences for both the aggravated murder and child endangering violate Ohio Revised Code § 2941.25, the Fifth and Fourteenth Amendments to the Untied States Constitution and Sections 10 and 16, Article I of the Ohio Constitution.

13. The state's failure to record the grand jury proceedings in Appellant Richey's case violated his rights to due process and a fair trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

14. Criminal Rule 12(E) requires the trial court to state its essential findings on the record when factual issues are involved in determining a motion. Failure to do so deprives the capital defendant of his rights to due process and adequate and meaningful review of his capital conviction as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and Sections 9 and 16, Article I of the Ohio Constitution.

15. Appellant Richey was denied the effective assistance of counsel at his capital trial in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Section 10, Article I of the Ohio Constitution.

16. The Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution require a complete record, the effective assistance of appellate counsel and meaningful appellate review in a capital case. The failure to record the panel's view of the scene in Appellant Richey's case violated these rights.

17. The sentencer's failure to give any weight and effect to relevant mitigating evidence in a capital case is contrary to the Eighth and Fourteenth Amendments of the United States Constitution and Sections 9 and 16, Article I, of the Ohio Constitution.

18. The sentence of death imposed on Appellant Richey was unreliable and inappropriate. The death sentence in Appellant's case violated the Eighth and Fourteenth Amendments to the United States Constitution, Article 1. Sections 9 and 16 of the Ohio Constitution and Ohio Revised Code § 2929.05.

19. When the reviewing court relies on matters outside the record and fails to give individualized consideration to the capital defendant's particular character and family background, the determination of the appropriateness of death sentence does not comport with the requirements of the Eighth and Fourteenth Amendments to the United States Constitution and Ohio Revised Code § 2929.05(A).

20. The "proportionality review" required by Ohio Revised Code § 2929.05 must meet the requirements of due process as required by the Fifth and Fourteenth Amendments to the United States Constitution. The present method of proportionality review conducted

affirmed petitioner's conviction.[3] *State v. Richey*, 595

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by this court does not meet those requirements.

21. The Fifth, Eighth and Fourteenth Amendments to the United States Constitution, Sections 10 and 16, Article I, of the Ohio Constitution and Ohio Revised Code § 2929.05 guarantee a convicted capital defendant a fair and impartial review of his death sentence. The statutorily mandated proportionality process in Ohio is fatally flawed thereby denying Appellant Richey the above rights.

22. A death sentence based on commission of a felony murder when the aggravating circumstance merely duplicates an element of felony murder, violated the Eighth and Fourteenth Amendments of the United States Constitution and Sections 2, 9, and 16, Article I of the Ohio Constitution.

23. The Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Sections 2, 9, 10 and 16, Article I, of the Ohio Constitution establish the requirements for a valid death penalty scheme. Ohio's statutory provisions governing the imposition of the death penalty, contained in Ohio Revised Code § 2903.01, 2929.02, 2929.021, 2929.022, 2929.023, 2929.03, 2929.04, 2929.05, do not meet the prescribed requirements and thus are unconstitutional, both on their face and as applied to Appellant Richey.

[3] Justices Sweeney, Wright and Brown dissented. In writing for the dissent, Justice Brown noted a mitigating factor that the majority overlooked and instances of trial error during the proceeding.

N.E.2d 915 (Ohio 1992). The Ohio Supreme Court thereafter denied petitioner's Motion for Rehearing. (Respondent Ex. 60). The United States Supreme Court subsequently denied petitioner's petition for certiorari. *Richey v. Ohio*, 507 U.S. 989 (1993).

Petitioner, represented by Paul E. Nemser and Scott E. North, then filed an application to reopen his direct appeal pursuant to Ohio Rule of Appellate Procedure 26. (Respondent Ex. 61). The Third District Court of Appeals denied the application, however, because petitioner failed to demonstrate the "good cause" necessary to excuse an

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Regarding mitigation, Justice Brown noted that Richey made several attempts to rescue Cynthia Collins from the fire. He entered the burning building to rescue her and told firemen and anyone else nearby "there's a baby in there." *State v. Richey*, 595 N.E.2d 915, 931 (Ohio 1992). Justice Brown chastised the majority for asserting that Richey attempted to interfere with rescue efforts, believing instead that "[w]hile there is some evidence that his presence (because he was overwrought) was not helpful, this is in no sense contradictory to the fact that defendant's desire was to save the child." *Id.* Moreover, Justice Brown cites Richey's lack of animus toward Cynthia Collins as a mitigating factor. He noted that Richey repeatedly inquired as to Cynthia's whereabouts as firefighters were extinguishing the fire. Justice Brown determined: "I can find no case in Ohio where a defendant in a felony murder case has been put to death unless he had specific animus towards the victim, or a direct, violent, face-to-face encounter with the victim, or both." *Id.* at 933.

Based on the above mitigating factors and some errors Justice Brown believed occurred during both the guilt and mitigation phases, Justice Brown concluded that the death penalty should be overturned in Richey's case.

untimely application.[4] Petitioner then appealed to the Ohio Supreme Court, raising twenty-five propositions of law.[5]

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[4] Ohio Rule of Appellate Procedure 26(B)(l) requires "[a]n application for reopening [to] be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time."

[5] The propositions of law are as follows:

> 1. The application of the transferred intent doctrine in Richey's case violated his Constitutional rights.
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> 2. The fundamental difference between Richey's indictment and the case that was tried against him constituted a constructive amendment of his indictment in violation of his right to indictment by a grand jury as guaranteed by Section 10, Article I, of the Ohio Constitution.
>
> 3. There was insufficient evidence to support the three-judge panel's express finding that Richey formed the specific intent to cause the death of Cynthia Collins.
>
> 4. The fundamental difference between the transferred intent theory the State announced in its Bill of Particulars and the three-judge panel's unsupported finding of a specific intent to kill Cynthia Collins deprived Richey of his federal and state constitutional rights.
>
> 5. There was insufficient evidence from which the three-judge panel could have found that Richey formed the specific intent to cause the death of Candy

Barchet and/or Mike Nichols.

6. To the extent the three-judge panel found Richey guilty as charged in the Bill of Particulars of specific intent to kill Barchet and/or Mike Nichols, the verdict was ambiguous and in violation or Richey's right to a unanimous verdict.

7. The statutory definition of "reasonable doubt" in Ohio Revised Code § 2901.05(D) reflects a clear and convincing evidence standard of proof – a standard markedly below that required by the federal and state constitutions.

8. The trial court erred when it informed Richey on December 12, 1986, nearly one month before trial, that his final opportunity to exercise his right to a jury trial would be that day.

9. At Richey's trial, substantial, irrelevant, immaterial and incompetent information, which was prejudicial to Richey, was introduced into evidence in violation of Richey's rights under federal and state constitution.

10. The trial court's rejection of Richey's mitigation arguments based on what it termed the unrefuted evidence that the defendant pulled the fire alarm [i.e., the smoke detector] from the hall prior to torching the decedent's apartment and effectively eliminated the chance that Cynthia Collins would awaken and escape her own demise was arbitrary and capricious because there was no evidence that Richey disconnected the smoke detector.

11. The three-judge panel's failure to consider "residual doubt" as to Richey's guilt as a mitigating factor during the penalty phase of Richey's trial deprived Richey of his rights under the state and federal constitutions and Ohio law.

12. By requiring that the mitigation factors introduced by Richey "justify", rather than simply "mitigate", the trial court deprived Richey of his rights as under the state and federal constitutions and Ohio law.

13. The Ohio death penalty scheme is unconstitutional because it imposes an increased risk of death on capital defendants who exercise their right to trial over those who plead guilty.

14. Richey was substantially prejudiced by the submission of a presentence investigation report ("PSI") to the three-judge panel.

15. On direct appeal, Richey's prior appellate counsel did not raise a number of deficiencies in Richey's trial counsel's performance.

16. Even if each of the individual deficiencies of Richey's trial counsel's performance (*see* Proposition of Law No. XV, supra, and original Brief of Appellant, Assignment of Error No. XIX) in and of itself did not render that performance constitutionally ineffective, the aggregate of those individual deficiencies did render trial counsel's performance constitutionally ineffective.

17. Richey received ineffective assistance of appellate counsel because prior counsel did not show this Court that the highly prejudicial and inflammatory fragment

of a letter written by Richey, which was improperly admitted at trial was utterly and indisputably false and misleading.

18. Richey received ineffective assistance of appellate counsel because prior appellate counsel did not argue that the restricted manner in which Ohio applies Section 2929.05 violated Richey's due process rights and renders Ohio's capital sentencing system without adequate safeguards against the arbitrary and capricious imposition of the death penalty.

19. Richey received ineffective assistance of appellate counsel because prior appellate counsel did not [raise] to this Court that the State's failure to record the grand jury testimony deprived Richey of the ability to prove that Count I of his Indictment was constructively amended and that he was, therefore, deprived of his Ohio state and constitutional right to indictment by grand jury.

20. Richey received ineffective assistance of counsel because prior appellate counsel omitted substantial residual doubt evidence from its presentation to this Court.

21. Richey received ineffective assistance of appellate counsel in contravention of his constitutional rights because prior appellate counsel prejudicially omitted five core problems from its challenge to the facial constitutionality of Ohio's statutory death penalty law.

22. Richey received ineffective assistance of appellate counsel in contravention of his constitutional rights

(Respondent Ex. 65). On August 30, 1995, the Ohio Supreme Court affirmed the denial of Richey's application for the reasons stated in the Third District Court of Appeals' decision.[6] *State v. Richey*, 653 N.E.2d 344 (Ohio 1995). Although Richey petitioned for a writ of certiorari to the

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because prior appellate counsel failed to raise meritorious issues concerning trial counsel's constitutional ineffectiveness because one member of the original appellate counsel team put his allegiance to Richey's trial counsel ahead of defendant Richey's interests.

23. Failure of original appellate counsel to petition the Ohio Supreme Court for rehearing where the Court applied an incorrect standard for the level of proof required in a criminal case constituted ineffective assistance of counsel in contravention of Richey's constitutional rights.

24. Failure of original appellate counsel to petition the Ohio Supreme Court for rehearing where the Court considered evidence not in existence constituted ineffective assistance of counsel in contravention of Richey's constitutional rights.

25. Failure of original appellate counsel to petition the Ohio Supreme Court for rehearing where the Court did not engage in a meaningful proportionality review as required by Ohio Revised Code 2929.05 constituted ineffective assistance of counsel in contravention of Richey's constitutional rights.

[6] Justice Wright dissented for similar reasons to Justice Brown in Richey's direct appeal.

United States Supreme Court, the Court denied the petition on April 1, 1996. *Richey v. Ohio*, 517 U.S. 1119 (1996).

Shortly thereafter, Richey filed a petition for a post-conviction relief in the Putnam County Court of Common Pleas, raising nine claims for relief.[7] (Respondent Ex. 69).

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[7] These grounds for relief are:

> 1. The State's experts used unsound scientific principles, which caused them to give false testimony.
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> 2. Trial counsel was ineffective because a defense retained expert was allegedly incompetent by failing to find that the fire was not caused by arson.
>
> 3. Trial counsel was ineffective for failing to adequately investigate the case by not searching for and finding a competent expert to rebut the State's arson evidence.
>
> 4. Trial counsel was ineffective for failing to present an expert to rebut the State's experts' testimony that the fire was caused by arson.
>
> 5. Appella[te] counsel was ineffective for failing to raise certain claims listed in Richey's Application for Reopening.
>
> 6. Trial counsel was ineffective at the guilt and penalty phases of Richey's trial.
>
> 7. Trial counsel was ineffective for failing to raise an alleged plea offer either as prosecutorial misconduct or as mitigation evidence at the penalty phase.
>
> 8. Trial counsel was ineffective for failing to elicit

After issuing its Findings of Fact and Conclusions of Law, the Court of Common Pleas dismissed Richey's post-conviction petition. (Respondent Ex. 73). Richey then appealed to the Third District Court of Appeals, raising three arguments.[8] The Third District affirmed the trial court's

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testimony on four different topics from a witness who testified at trial.

9. Trial counsel was ineffective for failing to include the entire letter that Richey wrote to his friend in Scotland or to secure an affidavit from "Gogs" to the effect that he had not been killed by Richey.

[8] Richey raised the following three assignments of error on appeal:

1. The State convicted Richey on the basis of false scientific testimony of arson which lacked any reliable scientific basis.

2. A competent expert would have concluded that, according to sound scientific principles, the physical evidence retrieved from the fire scene did not contain evidence of arson; to the contrary, the evidence was actually consistent with a fire caused by discard of smoking materials.

3. Competent counsel would have recognized that the expert hired to assist Richey was himself incompetent as a result of his decision not to conduct independent testing on the crucial physical evidence to verify the State expert's conclusion.

(Respondent Ex. 74)

decision on November 30, 1997. *State v. Richey*, No. 12-97-7. slip. op. (Ohio Ct. App. Nov. 18, 1997). Richey then appealed to the Ohio Supreme Court, raising four propositions of law.[9] On March 11, 1998, the Ohio Supreme Court dismissed Richey's appeal on the grounds that it did

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[9] Richey raised the following issues on appeal to the Ohio Supreme Court:

> 1. To present *prima facie* evidence of a constitutional violation based on actual innocence, a post-conviction petitioner need not "destroy" the State's case as presented at trial and need not prove his innocence with conclusive certainty; rather, it will suffice if he proffers new evidence establishing the scientific unreliability of the State's only evidence that a crime occurred.
>
> 2. A post-conviction claim is not procedurally barred by the doctrine of *res judicata* where new evidence outside the trial record shows that a constitutional violation has probably resulted in the conviction of one who is actually innocent.
>
> 3. Where a post-conviction petition presents *prima facie* evidence of a constitutional violation, a court cannot peremptorily decide the issue - R.C. 2953.21(E) requires that an evidentiary hearing must be conducted.
>
> 4. A trial court that relies upon its own personal knowledge in ruling on a post-conviction petition commits fundamental constitutional error.
>
> (Respondent Ex. 78).

not involve any substantial constitutional question. (Respondent Ex. 80).

Richey next filed his Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 with the Court on June 19, 1998. Because of the claim exhaustion requirement discussed, *infra*, Richey returned to state court on September 4, 1999 to file a second post-conviction petition. On January 24, 2000, the state trial court dismissed the petition on grounds that it was substantially based on the same issues raised in Richey's first post-conviction petition. (Amended Return of Writ at 17). The Third District Court of Appeals affirmed the trial court's decision on May 26, 2000. *State v. Richey*, No. 12-2000-03, 2000 WL 681642 (Ohio Ct. App. May 26, 2000). On July 10, 2000, Richey filed a Notice of Appeal and Memorandum of Opinion in Support of Jurisdiction with the Ohio Supreme Court. That court, however, declined jurisdiction on October 4, 2000. (Respondent Ex. 90.)

III. Habeas Proceeding

On June 19, 1998, petitioner filed the Petition for Writ of Habeas Corpus now pending before this Court. On June 25, 1998, the Court granted petitioner's Motion for Stay of Execution of Death Penalty Sentence pending decision on the instant Petition. The Court granted petitioner's Motion for Appointment of Counsel, admitting Paul E. Nemser and Kenneth J. Parsigian *pro hoc vice*, and appointing them to the case. On September 14, 1998 petitioner and respondent filed motions for discovery. The Court granted both motions.

Pursuant to General Order 99-18, this case was randomly reassigned to this Court on February 8, 1999. (Doc. No. 51.) Thereafter, petitioner filed a Motion to Stay the Pending Proceeding and/or Hold his Current Petition for Writ of Habeas Corpus in Abeyance to await the outcome of a second state post-conviction petition. This Court referred the

Motion to Magistrate Judge Streepy for a report and recommendation. Magistrate Judge Streepy recommended that the stay be denied without prejudice, permitting petitioner to re-file the Motion when and if the Ohio court decided to hear the post-conviction petition. This Court adopted Magistrate Judge Streepy's Report and Recommendation on November 19, 1999.

Petitioner then filed a Motion for an Evidentiary Hearing. Respondent opposed the Motion and the Court denied it on March 27, 2000. Additionally, the Court, pursuant to its authority under Rule 7 Governing Habeas Corpus Cases, expanded the record to include all discovery taken.[10] Thereafter, petitioner filed the Traverse and respondent filed a Response to the Traverse on August 22, 2000. On November 7, 2000, petitioner filed a Motion to Amend the Petition. This Motion entailed the addition of an exhausted claim following the denial of the second post-

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[10] This discovery, consisting of depositions and exhibits, included the following:

1. Deposition of Robert G. Cryer
2. Deposition of Laurence Gregory DuBois
3. Deposition of Dan Carl Gelfius
4. Deposition of Mohamed M. Gohar
5. Deposition of Leonard Heffner
6. Deposition of Roy Sargent
7. Deposition of Michael K. Simmons
8. Deposition of David Stebbins
9. Deposition of Steven J. Stechschulte
10. Deposition of Hope J. Sterling
11. Deposition of Marcia L. Wagoner
12. Fire Marshal Exhibits
13. Sheriff's Department Exhibits

conviction relief petition. Respondent filed a response but did not oppose the Motion and the Court granted petitioner's Motion. Thereafter, petitioner submitted an Amended petition and respondent submitted an Amended Return of Writ.

IV. Petitioner's Grounds for Relief

Petitioner asserts 27 claims for relief. The claims are as follows:

> 1. Because new evidence establishes that Richey was convicted on the basis of false and unreliable scientific testimony, Richey is actually innocent and his conviction and sentence violate the Eighth and Fourteenth Amendments.
>
> 2. To be convicted of aggravated murder under O.R.C. § 2903.01(B). the capital crime for which Richey was indicted, required proof of intent to cause the death of the person killed, and thus Richey's conviction based solely upon transferred intent violated his rights under the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments.
>
> 3. Because the State indicted Richey for specifically intending to cause the death of Cynthia Collins, but instead tried Richey for specifically intending to cause the deaths of Candy Barchet and/or Mike Nichols, the State constructively amended Richey's indictment in violation of the Fourteenth Amendment.
>
> 4. The three-judge panel convicted Richey on a charge that the State did not include in its Bill of Particulars and on which the State did not present evidence at trial, thereby violating Richey's rights

under the Fifth, Sixth, Ninth and Fourteenth Amendments.

5. The State's failure to record the grand jury proceedings violated Richey's rights under the Fifth, Sixth and Fourteenth Amendments, and Richey was harmed as a result of this error because it deprived him of the ability to prove that Count I of the Indictment was constructively amended.

6. The charge against Richey of aggravated murder was technically defective, and resulted in an ambiguous verdict in violation of Richey's right to a unanimous verdict as guaranteed by the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments.

7. Richey's due process rights under the Fifth and Fourteenth Amendments were violated when the trial court incorrectly informed Richey, nearly one month before trial, that his final opportunity to exercise his right to a jury trial would be that day.

8. Richey's rights under the Sixth and Fourteenth Amendments to trial by an impartial tribunal were violated when the three-judge panel failed to recuse themselves after they considered whether Richey was a menace and ordered him to be shackled prior to trial.

9. Because new scientific evidence establishes [that] Richey was convicted on the basis of false and unreliable scientific evidence, his conviction and sentence violates the Fourteenth Amendment.

10. There was insufficient evidence to convict Richey of the crimes with which he was charged or for which

he was tried, and thus Richey's conviction violated the Eighth and Fourteenth Amendments.

11. Richey was convicted on the basis of a standard of proof below that required by the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments.

12. Richey's right to a fundamentally fair trial as guaranteed by the Fifth, Ninth and Fourteenth Amendments was violated when the State introduced irrelevant evidence that Richey allegedly made verbal threats against the prosecutor and potential witnesses.

13. The prosecution improperly called as a State witness a defense expert retained by Richey, in violation of the Fifth, Sixth and Fourteenth Amendments.

14. Prosecutorial misconduct during the trial phase of Richey's trial violated his rights guaranteed by the Sixth, Eighth and Fourteenth Amendments.

15. Richey's right to a fundamentally fair trial as guaranteed by the Fifth, Ninth and Fourteenth Amendments was violated when the trial court admitted an irrelevant, inflammatory, and highly prejudicial letter in the presentence investigation report.

16. The three-judge panel's unsupported decision at sentencing to completely ignore Richey's compelling mitigation evidence deprived Richey of rights guaranteed under the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments.

17. Because the three-judge panel improperly

required that Richey's mitigating factors "justify" rather than simply 'mitigate," Richey's rights as guaranteed by the Fifth. Sixth, Eighth, Ninth and Fourteenth Amendments were violated.

18. The three-judge panel's failure to consider all mitigating factors during the penalty phase of Richey's trial deprived Richey of his rights under the Fifth, Eighth and Fourteenth Amendments.

19. The three-judge panel's failure to consider "residual doubt" as to Richey's guilt as a mitigating factor during the penalty phase of Richey's trial deprived Richey of his rights under the Fifth, Eighth and Fourteenth Amendments.

20. Richey received ineffective assistance of counsel during the guilt phase of his capital trial in violation of the Sixth and Fourteenth Amendments.

21. Even if each of the individual deficiencies of Richey's trial counsel's performance did not render that performance constitutionally ineffective, the aggregate of those individual deficiencies did render trial counsel's performance constitutionally ineffective.

22. Richey received ineffective assistance of appellate counsel in violation of the Sixth and Fourteenth Amendments.

23. Based upon record evidence, the sentence of death imposed upon Richey was inappropriate under Ohio law and therefore violates Richey's rights under the Eighth and Fourteenth Amendments.

24. Based upon new evidence, the sentence of death imposed upon Richey is inappropriate under Ohio law and therefore violates Richey's rights under the Eighth and Fourteenth Amendments.

25. The restricted manner in which Ohio applies its proportionality review violated Richey's due process rights under the Fifth and Fourteenth Amendments, and renders Ohio's capital sentencing system inadequate to safeguard against the arbitrary and capricious imposition of the death penalty.

26. Ohio's death penalty statute is unconstitutional because its proportionality review statute is arbitrarily and capriciously applied.

27. Richey's rights under the Fifth, Eighth, and Fourteenth Amendments were violated because other aspects of Ohio's death penalty statute are unconstitutional on their face and as applied to Richey.

28. The State violated Richey's rights as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments when it failed to disclose material exculpatory evidence.

V. Standard of Review

The Anti-Terrorism and Effective Death Penalty Act of 1996 (hereinafter "AEDPA"), Pub. L. 104-132 § 104, amending 28 U.S.C. § 2254 became effective on April 24, 1996. The AEDPA significantly altered the standard of review a habeas court must apply, requiring increased deference to a state court's decision. The relevant statute states:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1)-(2).

Before interpreting this statute, this Court must determine whether it is applicable to the instant case. In *Lindh v. Murphy*, 521 U.S. 320 (1997), the United States Supreme Court held that amended § 2254(d) does not apply to habeas corpus cases that were "pending" when the AEDPA was passed. In *Williams v. Coyle*, 167 F.3d 1036, 1040 (6th Cir. 1999), the Sixth Circuit determined that a habeas case can only be "pending" for purposes of applying the AEDPA once the petition is filed. The court first determined that the word must be given its ordinary meaning. *Id.* at 1038 (citing *Moskal v. United States*, 498 U.S. 103, 108 (1990)). Noting the similarities between the filing of a habeas petition and the filing of a civil complaint, the court noted that Federal Rule of Civil Procedure 3 states that "[a] civil action is commenced by filing a complaint with the court." Fed. R. Civ. P. 3.

The Sixth Circuit also looked to the language contained in § 2254 to support its finding. Specifically, § 2254(e) refers to "a proceeding instituted by an application

for a writ of habeas corpus." Moreover, section 1914(a) of Title 28 provides that the "district court shall require the parties instituting any civil action, suit or proceeding . . . to pay a filing fee of $ 150, except that on an application for a writ of habeas corpus the filing fee shall be $5." Thus, the statutes associate the commencement of a habeas corpus proceeding with the filing of the application or petition. Consequently, the Sixth Circuit determined that a habeas case "commences" when the petition is filed. Thus, for purposes of applying the AEDPA, a case may only be "pending" after it commences, or after the filing of the petition. *Id.*

In the instant case, Richey filed his Petition June 19, 1998, over two years after the AEDPA's effective date. Consequently, this Court utilizes the standard of review set forth in amended 28 U.S.C. § 2254(d).

Recently, the United States Supreme Court interpreted this statute in *Williams (Terry) v. Taylor*, – U.S. – 120 S.Ct. 1495 (2000).[11] According to *Williams*, the phrases "contrary to" and "unreasonable application of" must be given independent meanings. *Id.* at 1511. A state court decision can be "contrary to" a Supreme Court decision by one of two means: (1) "if the state court arrives at a

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[11] This decision supplants the Sixth Circuits prior interpretations of the statute in *Nevers v. Killinger*, 169 F.3d 352, 361-62 (6th Cir. 1998), *cert. denied*, 527 U.S. 1004 (1999) and *Maurino v. Johnson*, 210 F.3d 638, 643-44 (6th Cir. 2000), *cert. denied*, – U.S. –, 121 S.Ct. 427 (2000). *See Harris v. Stovall*, 212 F.3d 940, 943 (6th Cir. 2000) (holding that "[i]n light of the Supreme Court's decision in *Williams*, we find that *Nevers* and *Maurino* no longer correctly state the law on the issue of the appropriate standard under 28 U.S.C. § 2254(d).").

conclusion opposite to that reached by this Court on a question of law," and (2) "if the state court confronts facts that are materially distinguishable from a relevant Supreme Court precedent and arrives at a result opposite to" that decision. *Id.* Because the word "contrary" "is commonly understood to mean "diametrically different, opposite in character or nature, or mutually opposed," the Court noted, § 2254 "suggests that the state court's decision must be substantially different from the relevant precedent of [the Supreme Court]." *Id.* (citation omitted).

The Court then went on to find that a state court makes an "unreasonable application" of Supreme Court law, and thus a habeas court may grant relief, only if "the state court identifies the correct governing legal rule from this Court's cases, but unreasonably applies it to the facts of the particular state prisoner's case" or if the state court "either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Id.* at 1520. A fragmented Court also determined the "unreasonable application" language to mean something more than merely the state court's incorrect application of federal law. *Id.* at 1522. The Court noted that a reasonableness review of a state court decision involves an objective, rather than subjective review.

Finally, the *Williams* Court provided guidance on how to interpret "clearly established holdings of the Supreme Court." *Id.* at 1506. The Court stated that this statutory phrase "refers to holdings, as opposed to its dicta, of this Court's decisions as of the time of the relevant state-court decision." *Id.* The *Williams* Court also looked to *Teague v. Lane*, 489 U.S. 288 (1989) and its progeny to help guide federal courts as to what qualifies as 'clearly established Federal law." *Williams,* – U.S. – 120 S.Ct. at 1506. The Court opined that "[w]hatever would qualify as an 'old rule' under *Teague* will constitute 'clearly established Federal

Law, as determined by [this] Court'." *Id.* (citation omitted). Pursuant to *Teague*, "a case announces a new rule when it breaks new ground or imposes a new obligation on the States of the Federal Government." 489 U.S. at 301.

VI. Exhaustion and Procedural Default

A. Exhaustion

A state prisoner must exhaust his state remedies before bringing his claim in a federal habeas corpus proceeding. 28 U.S.C. § 2254(b), (c); *Rose v. Lundy*, 455 U.S. 509 (1982). Exhaustion is required once a state supreme court provides a convicted defendant an opportunity to review his or her claims on the merits. *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999). A habeas petitioner satisfies the exhaustion requirement when the highest court in the state in which the petitioner has been convicted has had a full and fair opportunity to rule on the claims. *Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994); *Manning v. Alexander*, 912 F.2d 878, 881 (6th Cir. 1990). If under state law there remains a remedy that petitioner has not yet pursued, exhaustion has not occurred and the federal habeas court cannot entertain the merits of the claim. *Rust*, 17 F.3d at 160.

Respondent concedes in the Return of Writ that Richey has exhausted all claims as they were either properly raised on direct appeal, raised in post-conviction and barred from review based on *res judicata* grounds, or there is no remaining state remedy for his claims. Return of Writ at 32. Thus, the exhaustion doctrine does not prohibit habeas review of Richey's claims.

B. Procedural Default

For purposes of comity, a federal court may not consider "contentions of federal law which are not resolved

on the merits in the state proceeding due to petitioner's failure to raise them as required by state procedure." *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977). If a "state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 749 (1991).

In *Maupin v. Smith*, 785 F.2d 135 (6th Cir. 1986), the Sixth Circuit Court of Appeals set out the analytical framework for determining the defaulted status of a claim: "When a state argues that a habeas claim is precluded by the petitioner's failure to observe a state procedural rule, the federal court must go through a complicated [four-prong] analysis." *Id.* at 138. Specifically, the Sixth Circuit stated:

> First, the court must determine that there is a state procedural rule that is applicable to the petitioner's claim and that the petitioner failed to comply with the rule . . . . Second, the court must decide whether the state courts actually enforced the state procedural sanction . . . . Third, the court must decide whether the state procedural forfeiture is an "adequate and independent" state ground on which the state can rely to foreclose review of a federal constitutional claim. [Fourth, if] the court determines that a state procedural rule was not complied with and that rule was an adequate and independent state ground, then the petitioner must demonstrate . . . that there was "cause" for him to not follow the procedural rule and that he was actually prejudiced by the alleged constitutional error.

Id. (citations omitted).

The respondent asserts that most all of the claims raised in the Petition are barred from review in this Court because they are procedurally defaulted.[12] Respondent asserts that these are valid procedural bars precluding this Court from affording the claim a merit review. Respondent asserts that the procedural default rests on one of three grounds: (1) res judicata bars a merit review pursuant to *State v. Perry*, 226 N.E.2d 104 (Ohio 1967) because the claim was first raised during post-conviction relief proceedings yet could have been raised on direct appeal; (2) res judicata bars a merit review pursuant to *State v. Perry* because the claim was first raised during petitioner's application to re-open his direct appeal pursuant to Ohio Rule of Appellate Procedure 26(B); and (3) the petitioner did not make the proper objections during trial, thus, the Ohio Supreme Court reviewed the claim pursuant to a "plain error" analysis.

Each of the above grounds will be addressed below.

1. The *Perry* Rule

Ohio Rule of Appellate Procedure 16(A)(3) requires an appellant to include in his or her appellate brief "[a] statement of the assignments of error presented for review, with reference to the place in the record where each error is reflected." Ohio R. App. P. 16(A)(3). In *State v. Perry*, 226 N.E.2d 104 (Ohio 1967). The Ohio Supreme Court ruled that:

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[12] Respondent alleges that petitioner has procedurally defaulted the following claims: 1, 2, 3, 4, part of 5, 6, 7, 8, 9, part of 10, 11, 12, 13, 15, part of 16, 17, part of 18, 19, part of 20, 22, part of 23, 24, part of 25, part of 26, part of 27, 28.

> Under the doctrine *of res judicata*, a final judgment of conviction bars the convicted defendant from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial which resulted in that judgment of conviction or on appeal from that judgment.

Id. at 108; *see also Stale v. Roberts*, 437 N.E.2d 598, 601 (Ohio 1982) (holding policy behind *Perry* bars post-conviction petitioners from raising issues that could have been raised on direct appeal in a collateral proceeding to avoid reversal of conviction based on collateral, rather than constitutional, issues). Thus, unless a claim is based on evidence *dehors* or outside of the record, it must be raised during direct appeal. The Sixth Circuit has found this rule is an "adequate and independent state ground" pursuant to *Maupin* to bar a merit review of petitioner's claim for non-compliance with this rule. *See, e.g., Mapes v. Coyle*, 171 F.3d 408, 420 (6th Cir. 1999), *cert. denied*, 528 U.S. 946 (1999) (noting that the *Perry* rule has been consistently applied.)

One noted exception to the *Perry* doctrine, however, "occurs when ineffective assistance of counsel is alleged and the petitioner had the same counsel during trial and on direct appeal. Even in its broadest form, this exception encompasses only those claims for which evidence is not contained in the trial record." *Id.* (citing *State v. Cole*, 443 N.E.2d 169, 171 (Ohio 1982)).

2. Ohio Rule of Appellate Procedure 26(B) and "Good Cause"

The Court will also address the defaulted status of several claims that respondent asserts, and Richey does not

dispute, counsel did not raise on direct appeal as is required pursuant to the doctrine created by *State v. Perry.*[13] Petitioner eventually did raise these claims in the context of ineffective assistance of appellate counsel when pursuing an application to re-open his direct appeal pursuant to Ohio Rule of Appellate Procedure 26(B) (hereinafter "*Murnahan* proceeding" or "application to re-open"). The Ohio Court of Appeals rejected petitioner's application, holding that petitioner did not demonstrate sufficient "good cause" to escape the ninety-day filing requirement of 26(B).[14]

As stated above, the Sixth Circuit, pursuant to *Maupin v. Smith*, 785 F.2d 135 (6th Cir. 1986), requires a habeas court to undertake a four-prong analysis when determining the defaulted status of a claim. First, the Court must determine whether there is an applicable state procedural rule. For these claims, *Perry* provides such a rule. Next, the Court must determine whether this rule is enforced with

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[13] Richey does not fall into the *State v. Cole* exception to the *Perry* rule because he had different counsel during trial than on direct appeal.

[14] That rule states in pertinent part:

> (1) A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel. An application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time.
>
> Ohio R. App. P. 26(B)(1).

regularity and, if so, if it is an adequate and independent state procedural rule that would bar federal review. As stated above, the Sixth Circuit has determined that *Perry* is enforced with regularity and is an adequate state procedural rule. Finally, the Court must determine whether petitioner can establish sufficient cause and prejudice to excuse the default.

Petitioner alleges that he can satisfy both these requirements. First, petitioner asserts that the "cause" for procedurally defaulting these claims is ineffective assistance of appellate counsel. Courts have held that ineffective assistance of counsel, if proved, is sufficient to satisfy the cause prong and excuse procedural default. *See, e.g., White v. Schotten*, 201 F.3d 743 753 (6th Cir. 2000), *cert. denied*, – U.S.–. 121 S.Ct. 332 (2000) (holding appellate counsel ineffective and permitting district court to address merits of claim if petitioner could demonstrate prejudice): *Hollis v. Davis*, 912 F.2d 1343 (11th Cir. 1990), *cert. denied*, 503 U.S. 938 (1992) (determining counsel's ineffectiveness for failure to challenge racial composition of jury sufficient to establish cause to excuse procedural default).

The United States Supreme Court recently determined, however, that a petitioner may only use an ineffective assistance of counsel claim to establish cause if that separate ineffective assistance of counsel claim is, in itself, not procedurally defaulted. *Carpenter v. Edwards*, – U.S.–, 120 S.Ct. 1587 (2000). Thus, pursuant to *Carpenter*, a habeas petitioner must demonstrate either that the distinct ineffective assistance of counsel claim is not procedurally defaulted, or cause and prejudice to excuse the default for that claim.

In the instant case, Richey seemingly has defaulted his ineffective assistance of appellate counsel claim because he failed to file a timely application to reopen his direct appeal as Ohio Rule of Appellate Procedure 26(B) requires. When subjecting this rule to the *Maupin* analysis, however, the

defaulted status of this claim becomes less certain. Specifically, it is unclear whether Rule 26(B) is an adequate and independent state procedural rule to which this Court owes deference because it may not be regularly applied. A procedural rule is not "adequate," unless, among other things, it is regularly and consistently applied. *See Warner v. United States*, 975 F.2d 1207, 1213 (6th Cir. 1992), *cert. denied*, 507 U.S. 932 (1993) (stating that the rule only applies to "firmly established and regularly followed state practices" and citing *Ford* v. *Georgia*, 498 U.S. 411(1991)).

While the Sixth Circuit has yet to address this issue directly, it noted in *dicta* that "[a] review of the Ohio court of appeals cases . . . reveals that the state courts have not achieved consensus on what constitutes 'good cause' to excuse non-compliance with Rule 26(B)." *White v. Schotten*, 201 F.3d 743, 751 (2000). Indeed, the cases reveal inconsistencies in finding "good cause." *Compare State v. Houston*, 652 N.E.2d 1018 (Ohio 1995) (affirming appellate court's determination that *pro se* petitioner's assertion that he was denied access to trial transcript was not "good cause" for failing to file petition until one year after journalization of judgment) with *State v. Wright*, No. 93CA2110, 1994 WL 398805 (Ohio Ct. App. July 29, 1994) (holding state's failure to oppose petition constituted "good cause" to excuse ninety day requirement); *State v. Nitenson*, No. 91CA796, 1994 WL 69894 (Ohio Ct. App. Feb. 24, 1994)(determining courts have held *pro se* litigants to different standard than counsel and permitting merit review although petition flied one year after journalization of judgment). Consequently, the Court determines that, certainly as of the date Richey filed his Rule 26(B) application, the "good cause" rule had not yet been applied with the regularity necessary to constitute an adequate and independent state procedural rule.

Although respondent notes that in one unpublished opinion the Sixth Circuit affirmed a district court's finding that a petitioner had procedurally defaulted based on Rule

26(B), *Riggins v. Turner*, 110 F.3d 64 (Table), 1997 WL 144214 (6th Cir. Mar. 27, 1997), that case is of no avail. While the *Riggins* court did affirm the district court's procedural default finding based on the petitioner's failure to comply with Rule 26(8), it did so without commenting on the adequacy of that rule. Furthermore, the fact that *Riggins* is an unpublished opinion should do little to sway this Court as to its import. As the Sixth Circuit recently noted, unpublished opinions are not binding upon subsequent panels within the Circuit and, thus, have a less influential effect on this Court. *Scott v. Mitchell*, 209 F.3d 854, 866 (6th Cir. 2000), *cert. denied*, – U.S. –, 121 S.Ct. 588 (2000). Consequently, the Court is constrained to find that Ohio Rule of Appellate Procedure 26(B) is not an adequate and independent state ground on which to find that petitioner has defaulted his ineffective assistance of appellate counsel claim. Petitioner may, therefore, assert that claim as "cause" to excuse the default of many of his claims.

The analysis does not end with this conclusion, however. Petitioner must demonstrate "that [he] received ineffective assistance of appellate counsel that rose to the level of a violation of [his] Sixth Amendment rights" to successfully assert this claim as cause and overcome the procedural default hurdle. *Seymour v. Walker*, 224 F.3d 542, 550 (6th Cir. 2000). Specifically, petitioner must satisfy the two-prong test for ineffective assistance of counsel set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). First, the petitioner must demonstrate that counsel's errors were so egregious that "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* Second, the petitioner must show that he or she was prejudiced by counsel's errors. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.*

To successfully assert an ineffective assistance of counsel claim, a petitioner must point to specific errors in

counsel's performance. *United States v. Cronic*, 466 U.S. 648, 666 (1984). Thereafter, a reviewing court must subject the allegations to rigorous scrutiny, determining "whether, in light of all circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. A reviewing court must strongly presume that counsel's conduct was reasonable and might be part of a trial strategy. *Id.* at 689. To ascertain whether counsel's performance prejudiced a criminal proceeding, a reviewing court does not speculate whether a different strategy might have been more successful, but a court must "focus[] on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." *Lockhart v. Fretwell*, 506 U.S. *364*, 372 (1993).

Petitioner asserts the facts on which he bases an ineffective assistance of appellate counsel claim in the twenty-second ground for relief but does not provide further factual support when addressing the defaulted status of each claim. Thus, the Court must look to petitioner's twenty-second ground for relief to extract a bases on which petitioner may successfully utilize this claim to excuse his procedural default. The Court determines that petitioner cannot utilize ineffective assistance of appellate counsel as cause to excuse procedural default because he cannot establish that counsel's behavior was objectively unreasonable.

Richey alleges ineffective assistance of appellate counsel in a two-step fashion: First, Richey contends there are numerous claims counsel failed to raise on direct appeal.[15] Second, Richey asserts that counsel failed to raise

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[15] Specifically, Richey alleges that appellate counsel failed to raise the following nineteen issues:

1) application of transferred intent theory
2) variance between the intent theories in the

indictment and evidence presented during trial

3) insufficient evidence to find intent to kill Cynthia Collins
4) difference in intent theories between the indictment and Bill of Particulars
5) insufficient evidence to prove that Richey formed a specific intent to kill Candy Barchet and/or Mike Nichols
6) the verdict was ambiguous and in violation of Richey's right to a unanimous verdict
7) Ohio's statutory definition of "reasonable doubt" falls below the standard required by the Ohio and federal constitutions
8) trial error to require Richey to waive right to jury trial one month before trial
9) state permitted to introduce irrelevant and prejudicial testimony
10) three-judge panel found that Richey pulled smoke detector from ceiling
11) residual doubt
12 three-judge panel required Richey to "justify" rather than "mitigate"
13) Ohio death penalty unconstitutional because it places an increased risk on capital defendants opting for trial
14) prejudice resulting from the introduction of the presentence investigation report
15) not enough ineffective assistance of counsel issues raised
16) prejudicial portion of letter introduced during trial
17) Ohio applies Ohio Rev. Code § 2929.05 without adequate safeguards
18) state's failure to record- grand jury proceedings
19) Ohio death penalty is facially unconstitutional

these claims because of a conflict of interest arising between trial counsel and the chief of the capital crimes section in the Ohio Public Defender's Commission. Specifically, one of Richey's appellate counsel, Kenneth Murray, contends that his supervisor, David Stebbins, ordered him to remove all ineffective assistance of trial counsel claims because of his friendship with William Kluge, Richey's trial counsel. (Murray Dep. at 50.)

Based on the discovery taken in this proceeding. Richey cannot prove that counsel's behavior was objectively unreasonable. Certainly, if the scenario Murray alleges were authenticated, counsel's behavior would satisfy the first *Strickland* prong. It is undoubtedly unreasonable for a supervisor to order the removal of colorable ineffective assistance of counsel claims merely because of a personal relationship with trial counsel. Richey is unable to prove this fact, however. In the depositions of both Murray and Stebbins, neither affirmatively state that the reason for Stebbins' request was because of his personal relationship with Kluge.

In Murray's deposition, he testified that Stebbins met with him on one occasion to request that he remove all ineffective assistance of counsel claims from his appellate brief. Although Murray indicated that he believed Stebbins' order was based on his friendship with Kluge,[16] Murray also

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[16] During the deposition the following exchange took place:

> Petitioner's Counsel: Did you believe when Mr. Stebbins directed you not to include ineffective assistance of counsel claims in Mr. Richey's direct appeal brief that the reason for Mr. Stebbins' directive was his friendship with Mr. Kluge?
>
> ***
>
> Murray: Yeah, that's what I thought was happening,

indicated that the stated reason at the time of their meeting was Stebbins' concern that these issues would be better supported by evidence outside the record. Therefore, raising them prematurely on direct appeal would bar a post-conviction review. (Murray Dep. at 28.) Similarly, while Stebbins revealed during his deposition that he had no independent recollection of his meeting with Murray on this case, he noted that the issue of when to raise ineffective assistance of counsel claims was, and remains, a difficult one to decipher. (Stebbins Dep. at 50.)

Thus, both agree that, at least facially, Stebbins' grounds for ordering the ineffective assistance of counsel claims be removed from the appellate brief are part of a tactical decision that would not run afoul of *Strickland.* Therefore, petitioner is unable to establish objectively unreasonable behavior pursuant to *Strickland.* The petitioner also cannot establish prejudice. That conclusion, however, will be explored more fully in examining petitioner's twenty-second ground for relief. For purposes of procedural default, the Court need only conclude here that petitioner may not utilize ineffective assistance of counsel to excuse it. All claims that were initially raised during petitioner's *Murnahan* application but should have been raised on direct appeal are procedurally barred.

3. Plain Error Review

Respondent also alleges that petitioner procedurally defaulted some of his claims because the Ohio Supreme Court addressed these claims pursuant to a plain error analysis. Richey responsively argues that although the Ohio

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that they were friends and he didn't want me to attack Bill in the brief. (Murray dep. at 50.)

Supreme Court may have invoked a plain error review, it then went on to address the claim on its merits. Thus, concludes Richey, the Ohio Supreme Court performed a merit review of the claim, entitling him to a similar review here. Richey further notes that pursuant to *Harris v. Reed,* 489 U.S. 255, 263 (1989), for a state court to bar federal review, it must "clearly and expressly" reject the claim on its merits. *Id.* Richey contends that because the Ohio Supreme Court performed a merit review, this was not a clear expression of the state court's intention to bar this Court from a habeas review of the claim.

The Sixth Circuit, however, teaches otherwise. In *Scott v. Mitchell,* 209 F.3d 854, 866 (6th Cir. 2000), the Sixth Circuit noted that an alternative holding in which the state court performs a plain error analysis, such as what the Ohio Supreme Court at times performed in the instant case, does not constitute a waiver of the state procedural bar preventing a habeas court from reviewing the claim. Moreover, in *Seymour v. Walker,* 224 F.3d 542, 557 (6th Cir. 2000), the court explicitly rejected Richey's assertion stating "[c]ontrolling precedent in our circuit indicates that plain error review does not constitute a waiver of state procedural default rules." Thus, the Court finds that any claim in which the Ohio Supreme Court addresses a claim pursuant to a plain error analysis is procedurally defaulted. To be entitled to a merit review of those claims, petitioner must demonstrate cause and prejudice to excuse the default.

4. Miscarriage of Justice Exception

In addition to asserting cause and prejudice to save some of his claims from procedural default, Richey argues in the Traverse that because he is actually innocent, no procedural bars apply to any of his claims and he is entitled to a merit review. Pursuant to the miscarriage of justice exception to the procedural default bar, a habeas petitioner's

actual innocence of a crime entitles that petitioner to a merit review of his or her claims. *Schlup v. Delo,* 513 U.S. 298, 314-15 (1995). In *Schlup*, the Supreme Court determined that the petitioner should have been afforded a merit review of his claims after evidence suggested that he had been a victim of mistaken identity in the murder of a prison inmate. The Court went on to determine what standard would apply in instances which a habeas petitioner asserts actual innocence. Noting that it had decided a "trio of cases" dealing with the miscarriage of justice exception as applied to successive petitions, the Court explained the standards set forth in those cases. *Id.* at 320. In *Kuhlmann v. Wilson*, 477 U.S. 436 (1986), *Murray v. Carrier*, 477 U.S. 478 (1986), and *Smith v. Murray*, 477 U.S. 527 (1986), the Court determined that "the petitioner must show that the constitutional error 'probably' resulted in the conviction of one who was actually innocent . . . [and] that the petitioner would be required to establish by a 'fair probability' that 'the trier of the facts would have entertained a reasonable doubt of his guilt." *Id.* at 322 (citations omitted).

Subsequently, in *Sawyer* v. *Whitley*, 505 U.S. 333 (1992), the Court revisited the miscarriage of justice exception, this time in the context of a petitioner who claimed he was "actually innocent of the death penalty." *Schlup*, 513 U.S. at 323. In addition to defining "actual innocence of the death penalty," the *Sawyer* Court disregarded the *Carrier* standard, articulating a more rigorous standard in which a petitioner "must show by clear and convincing evidence that but for constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty." *Id.* (internal quotation marks and citations omitted).

The *Schlup* Court then addressed the issue of whether the *carrier* or *Sawyer* standard applied in cases such as are presented here, where the petitioner seeks to utilize claims of actual innocence as a gateway to assert he was wrongly

convicted of the crime, rather than merely objecting to the death sentence, and should therefore escape the procedural default bar. The Court determined that the less stringent *Carrier* standard struck a fair balance between the state's concerns for finality and petitioner's allegations of trial error when the petitioner alleges that constitutional error resulted in the conviction of one who is actually innocent. *Id.* at 324. Pursuant to this standard, a habeas petitioner must demonstrate that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Id.* at 327 (quoting *Carrier*, 477 U.S. at 496). To constitute the necessary "probability," the petitioner must show "that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Id.* The *Schlup* court noted the specific analysis the district court must employ when faced with a petitioner's allegation of actual innocence:

> It is not the district court's independent judgment as to whether reasonable doubt exists that the standard addresses; rather the standard requires the district court to make a probabilistic determination about what reasonable, properly instructed jurors would do. Thus, a petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.

Id. at 329.

Prior to the *Schlup* decision, the Supreme Court had decided a case in which the habeas petitioner raised his innocence as a "free-standing" claim, or one that did not relate to any trial error but asserted that the execution of an innocent person would *per se* violate the Fourteenth

Amendment. *See Herrera v. Collins*, 506 U.S. 390 (1993) (discussed in petitioner's first ground for relief, *infra).* The Court distinguished a *Herrera* actual innocence claim from the *Schlup* petitioner's actual innocence claim. An error free trial, the Court explained, is subject to a heightened degree of deference. Alternatively, a habeas petitioner who presents evidence of his innocence that is "so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of non-harmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of the underlying claims." *Schlup,* 513 U.S. at 316.

A review of the new evidence Richey presents in this proceeding suggests that he does not meet the *Schlup* standard. In his Traverse, petitioner asserts that his newly acquired experts establish his actual innocence on several grounds. First, petitioner makes the statutory argument that Ohio Revised Code § 2903.01(D) prohibits a jury from convicting for aggravated murder unless the defendant "specifically intended to cause the death of the person killed." Traverse at 10. Because respondent does not dispute that there is no evidence suggesting Richey intended to cause Cynthia Collins' death, Richey claims that his conviction cannot survive the *Schlup* standard; that it is likely no reasonable juror would have found him guilty beyond a reasonable doubt.

This claim is inapplicable to an actual innocence claim under *Schlup. Schlup* permits a habeas petitioner armed with new facts supporting his or her innocence to demand a habeas court's review of such evidence under the *Carrier* standard. There is no room in *Schlup* for claims, such as petitioner presents here, that the trial court improperly applied state law. Such state law claims are not cognizable in habeas proceedings. A federal habeas court does not act as another state appellate court to review a state's implementation of its statutes. *Allen v. Morris,* 845 F.2d

610, 614 (6th Cir. 1988), *cert. denied*, 488 U.S. 1011(1989). Accordingly, the Court finds this claim inapplicable to the miscarriage of justice exception.

Petitioner's next several claims of actual innocence attempt to undermine the scientific evidence of arson presented during trial. These claims correspond to the "new evidence" review mandated by *Schlup* and thus must be reviewed thoroughly then subjected to the *Carrier* "reasonable juror" standard. Petitioner first asserts that the affidavits and depositions of Dr. Andrew T. Armstrong, a Certified Professional Chemist specializing in forensic science and Professor L.P. Custer, a fire investigator, satisfy the *Schlup* standard. While both Armstrong arid Custer's depositions, discussed herein, cast doubt upon the state's evidence, they do not establish Richey's innocence so that, in all probability, no reasonable juror could convict. Accordingly, the Court determines that this evidence does not prevent a procedural bar to Richey's defaulted claims.

Before addressing petitioner's claims, this Court presents the following background information not elicited by the Ohio Supreme Court's factual findings: During trial, Dan Gelfius, a forensic chemist from the Ohio Arson Crime Lab (hereinafter "OACL"), testified that samples 4 and 7, carpet from Hope Collins' living room and wood from the apartment balcony, contained paint thinner, and sample 5, another living room carpet sample, contained gasoline. (Trial Tr. 836; Traverse at 13.) To identify these compounds, Gelfius used a chemical extraction procedure known as gas chromatography.[17] Unbeknownst to Gelfius, however, prior to testing, the carpet had been removed from the Collins

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[17] Chromatography is a method of separating and analyzing mixtures of chemical substances in an ascending molecular-weight sequence onto a solid adsorbent material. Dictionary of Scientific and Technical Terms, 293 (2d ed. 1978).

apartment and deposited at the county dump before the Fire Marshall's Office retrieved it a few weeks later. Additionally, once retrieved, the carpet was stored in the Sheriff's Department parking lot near gasoline pumps.

In his Traverse, Richey asserts that his experts can establish that the cause of the fire was accidental. In his deposition, Armstrong found that neither of the accelerants the state claimed were present on the living room carpet or wood decking samples were actually present. Specifically, Armstrong concluded that the chromatograms Gelfius produced when testing the carpet samples did not produce the classic "five peak component" necessary to identify gasoline or the clear resolution necessary to make such a determination)[18] (Armstrong Dep. at 47.) Additionally, Armstrong concluded that although the "five peak component" was not the standard[19] that the American Society for Testing Materials (hereinafter "ASTM") adopted until after 1986, it was fast becoming the standard at that time and was accepted generally by government and private laboratories during that period. Along with the subsequent adoption of that standard, petitioner notes, the ASTM indicated that gasoline can be easily confused with the remains of burned carpet. Thus, Armstrong concluded that it is impossible to determine whether gasoline was present on the carpet samples.

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[18] A peak is the maximum instantaneous value of a quantity. *Id.* In his deposition, Armstrong stated that the American Society for Testing Materials identifies gasoline using a "five peak component" pattern. (Armstrong Dep. at 47.) This standard was not defined, however, until 1986. *Id.*

[19] An accepted reference sample used for establishing a unit for measurement of a physical quantity. Dictionary of Scientific and Technical Terms, 1526 (2d ed. 1978).

Armstrong further concluded that the chromatograms Gelfius produced and identified as paint thinner contained normal alkanes,[20] which are found in paint thinner but may also be found in other household materials such as furniture polish, insecticides and glues. (Armstrong Dep. at 68.) Once again, Armstrong did not find that the state's evidence was sufficient to establish paint thinner was present on the carpet or deck wood with a degree of scientific certainty.

Petitioner also attacked the findings of Robert Cryer, the Assistant Fire Marshall who investigated the case. Cryer testified during trial that he found three indicia of arson: (1) "pour patterns," or areas of the living room carpet and wood deck on which it appeared some substance was poured; (2) the burning between the cracks in the deck; and (3) the quick, intense nature of the fire. (Trial Tr. 745.) During his deposition, Custer denied that any of the factors Cryer relied upon suggested that the fire's cause was anything but accidental. Instead, Custer determined that the "evidence" of arson Cryer had found at the scene was consistent with an accidental fire that reached "flash-over"[21] conditions. Custer stated that flash-over can occur in both accelerated and non-

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[20] A member of a series of saturated aliphatic hydrocarbons having the empirical formula C_nH2_{n+2}. *Id.* at 50.

[21] Custer defined the term "flash-over" during the course of his deposition:

> Q: * * * You talk about flash-over. Flash-over is the point at which temperatures reach a certain point in the room where other items in the room are going to be ignited just by the presence of that heat?
> A: By the presence of radiation.
> Q: Radiated heat?
> A: Radiated heat.
> (Custer Dep. at 50.)

accelerated fires. (Custer Dep. at 52-3.) He discounted the state's evidence of pour patterns on the rug, asserting that under the state's theory too much accelerant would need to be utilized to correspond with the state's pour pattern findings. Specifically, Custer claimed that it takes approximately one gallon of accelerant to produce one square foot of the irregularly shaped pattern on the carpet arid wood decking the state claimed was a pour pattern. Because the state identified approximately ten square feet of such a pattern, Custer maintained that the state's pour pattern theory was implausible. (Custer Dep. at 57-9.).

Custer further stated that gaps in the wood decking planks caused the irregular burn patterns Cryer had testified were indicative of accelerant use. Additionally, Custer discounted the theory that the speed of the fire was suggestive of accelerant use. (Custer Dep. at 80.) Custer opined that, generally, the rapidity of a fire is irrelevant to whether accelerants are used. *(Id.)* Rather, Custer determined that the cause of the fire was most likely a dropped cigarette that had smoldered in the couch for several hours or the result of Cynthia Collins' own play with matches. (Custer Dep. at 76.) Custer based his theories on the fact that Hope Collins was a smoker and an affidavit by a Collins neighbor, Peggy Villarreal, that Cynthia previously had played with matches, igniting a mattress. Finally, Custer found Cryer's assertion that the smoke detector had been dislodged prior to starting the fire to be speculative. Custer countered that the temperature that reached the ceiling could have been sufficient to melt or distort a properly secured smoke detector. (Petitioner Ex. 1 to the Petition.)

Petitioner's final means of attacking the state's arson theory was to assert that the evidence adduced during trial was wholly unreliable. During trial, Cryer testified that any concerns he had felt by the chain of evidence problem regarding the carpet were allayed by the fact that the OACL had identified the same paint thinner on both the carpet and

wood decking. During depositions of OACL employees Gohar and Gelfius, however, both stated that they could not determine whether the paint thinner was from the same brand. Thus, petitioner seeks to cast doubt on the accuracy of Cryer's testimony. Moreover, petitioner asserts that the retention time[22] that the OACL finds within an acceptable range varies as much as three minutes. Petitioner also asserts that Gohar and Gelfius could not agree during their depositions as to the proper method by which to identify gasoline and paint thinner from a chromatogram. Finally, petitioner asserts that DuBois' testimony is unreliable because he relied upon the same indicia of arson as Cryer. Because, as stated above, Custer refuted Cryer's testimony, DuBois' testimony similarly should be refuted.

Although the new factual evidence presented to the Court undermines some of the state's trial theory regarding arson, there are a multitude of reasons why this Court finds that the new factual evidence does not satisfy the *Schlup* standard. First, Armstrong asserted that Gelfius did not utilize the proper five peak standard to determine the presence of gasoline. In his deposition, however, Gelfius explained that he found the presence of gasoline based on standards of deteriorated gasoline he used in his lab. (Gelfius Dep. Vol I, at 104). These standards, Gelfius stated, were not identical to standards of "pure" gasoline but were standards he had obtained when exposing gasoline to intense heat, similar to what gasoline would look like after a fire. Thus, Gelfius explained why there might be some irregularities between the standard he used to detect gasoline and the five-peak standard now accepted as a standard gasoline

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[22] In gas chromatography, the time at which the center, or maximum, or a symmetrical peak occurs on a gas chromatogram. Dictionary of Scientific and Technical Terms, 1361 (2d ed. 1978).

chromatogram.

When questioned during his deposition regarding the presence of paint thinner, Gelfius agreed that paint thinner compounds are utilized in numerous household products, such as pesticides or lamp oils. Gelfius discounted the presence of the compound he viewed in the Richey case as anything other than paint thinner because in those samples there had been "quite a bit of pyrolysis"[23] which would typically be found only in compounds subject to halogenation,[24] unlike insecticides. (Gelfius Dep. Vol. II, at 261-62.) Gelfius also discounted lamp oils because the chemical composition of lamp oils differs noticeably from paint thinner. *Id.* at 262. Thus, Gelfius explained, at least partially, why some other household chemicals could not be confused with his identification of paint thinner.

Petitioner next seeks to discredit the testimony of Robert Cryer because Custer discredited the three bases on which he found the fire to be intentionally set: the "pour patterns," the irregular burning of the deck wood, and the speed with which the fire consumed the Collins apartment. During Custer's deposition, however, he admitted that he based his conclusions on a model in which no accelerants were used. (Custer Dep. at 37.) Custer also did no further factual investigation than rely on Armstrong's findings. Moreover, other scientists have found that the speed at which

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[23] The breaking apart of complex molecules into simpler units by the use of heat. Dictionary of Scientific and Technical Terms, 1296 (2d ed. 1978).

[24] A chemical process or reaction in which a halogen element is introduced into a substance, generally by the use of the element itself. Dictionary of Scientific and Technical Terms, 719 (2d ed. 1978).

the fire burns is indicative of accelerant use.[25] Thus, Custer's findings merely represent a difference in scientific opinion. Finally, as respondent points out in her sur-reply, while Custer maintained that the fire began by either a smoldering cigarette in the couch or child's play, Custer has never viewed the couch and does not know whether this theory is a plausible one. Custer's theory that Cynthia started the fire herself, the respondent asserts, would require a reasonable juror to believe that the child awoke at 4:00 a.m., set the fire in the living room, then returned to her bedroom to fall back to sleep. Although petitioner certainly would have been within his right to present such a theory at trial, this theory does not meet the *Schlup* requirement that a reasonable juror probably would, not have convicted petitioner based on this "new" information.

Similarly, while the petitioner attempts to subvert the evidence the state presented at trial, the evidence uncovered through discovery in this habeas proceeding does not meet the *Schlup* standard to excuse petitioner's procedural default. First, Richey correctly states that both Gohar and Gelfius stated during deposition that they could not identify specific brands of paint thinner in their chromatogram analysis. (Gelfius Dep. Vol. II at 204.) Richey next states that during trial, Cryer testified that the paint thinner from the deck and

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[25] *See, e.g.*, Café, Tony "The Science and 'Art' of Fire Investigation," Firepoint Magazine, Sept. 1998 at 2 ("Reports from fire fighters or eyewitnesses of a rapid fire or of suspicious odours can also indicate the presence of an accelerant."); Bertseh, Wolfgang "Chemical Analysis of Fire Debris: Was it Arson?" Analytical Chemistry, Sept. 1, 1996 at 541A ("A fire that appears to have multiple origins, suspicious burn patterns, an unusually high rate of spreading, or remnants of an ignition device is a primary candidate for arson.").

carpet were identical. Cryer's testimony, however, is not so clear cut. When questioned regarding the reliability of the carpet samples given its chain of evidence problems Cryer testified:

> Well, one thing about it, we have got paint thinner out on the patio which stayed there and we have got the same thing back in one spot on the carpet. So I would say those two – there is no question about those two are the same at the same time.
>
> If we had no positive sample from the patio or any other area, then it might be a little more reasonable to believe that the possibility could go either way.

(Tr. Trans. at 806.) It is somewhat ambiguous whether Cryer is attempting to testify that the paint thinner *brands* were identical or whether he is merely trying to convey that the presence of paint thinner was found both on the carpet and the wood deck. Richey also fails to note that defense counsel amply pointed out that the carpet's whereabouts undermined Cryer's findings:

> Defense counsel: Well, now, suppose it is out at the dump and buried underneath a pile of trash and there is a can of gasoline or can of paint thinner and it drips on the carpet. There would be no way for you to discern whether that accelerant came from the dump or whether that accelerant was there before.
>
> Cryer: No, sir.

Defense counsel: No further questions.

(Tr. Trans. at 807.) Thus. defense counsel amply highlighted during trial the possibility that the carpet was tainted through its prior locations. Because Richey can neither affirmatively demonstrate that Cryer's testimony was based on the paint thinner brand identification, and because trial counsel amply underscored the chain of evidence problems with the carpet, he does not demonstrate that a reasonable juror probably would have acquitted him based on "new" evidence.

Richey also makes much of the fact that Gelfius and Gohar could not identify the gasoline and paint thinner from the same peaks in the chromatogram. This point is irrelevant, however, because Gelfius was the sole witness from the OACL to testify during trial. Thus, because the three-judge panel's decision was based on his testimony alone, the fact that he and Gohar cannot now agree on how to identify gasoline and paint thinner is beside the point. Petitioner does not now allege that Gelfius' testimony contradicts what was presented to the jury. Thus, this "evidence" is not new and already was considered during trial.

Finally, Richey takes issue with the fact that DuBois utilized the same faulty mechanisms for determining the fire was set purposefully as did Cryer. Because Custer was able to undermine Cryer's reasoning. DuBois' testimony should likewise be undermined. As noted above, however, Custer's theories are not settled principles among forensic scientists. Moreover, during deposition, DuBois stated that he reached his own, independent conclusions regarding the presence of accelerants after fully discussing and analyzing Gelfius' findings. (DuBois Dep. at 109.) Finally, DuBois did not rely specifically on Cryer's findings when concluding the fire was purposefully set. When asked during deposition whether he considered an accidental cause to the fire he responded affirmatively, but ruled out that possibility because:

> In particular, [he] had looked at some appliances that had been removed from the home that could have been an accidental cause of the fire. A malfunction of one of these appliances may have caused an electrical fire in particular. Those did not show any evidence that they had caused the fire.
>
> In addition, [he] had photographs that showed . . . burn patterns that were consistent with an accelerant-induced fire and not an accidentally caused fire. And [he] had laboratory analyses that indicated . . . that there was an accelerant present in those samples.

(DuBois Dep. at 130.) Thus, DuBois relied on indicia of arson other than Cryer's three factors to determine that this was an arson fire.

Taken cumulatively, the new evidence supplied during discovery in this case does undermine the scientific findings presented at trial. This evidence does not, however, fully exonerate Richey nor reveal facts affirmatively supporting his innocence. In fact, Richey does little to refute the sizable lay testimony adduced during trial that he had threatened to burn down "A" Building that evening. This lay testimony coupled with the scientific evidence presented during trial could have permitted a reasonable juror to convict even if Richey had presented his own expert testimony during trial. Accordingly, petitioner does not meet the *Schlup* standard and will not be permitted to escape procedural default pursuant to the miscarriage of justice exception.

VII. Analysis of Petitioner's Claims[26]

Ground 1: Because new evidence establishes that Richey was convicted on the basis of false and unreliable scientific testimony, Richey is actually innocent and his conviction and sentence violate the Eighth and Fourteenth Amendments.

Initially, the Court notes that this claim is not procedurally defaulted. Although it was first raised to the trial court during post-conviction relief proceedings and barred as *res judicata*, the Court of Appeals addressed this claim on the merits on appeal. Thus, the Court addresses the merits of this claim.

In his first ground for relief, Richey contends that he is not guilty of the underlying conviction for which he received the death penalty, thus his execution would violate the Eighth and Fourteenth Amendments. Like his procedural default actual innocence claim, Richey asserts that the "new evidence" presented by his experts during habeas discovery affirmatively demonstrates his innocence. Specifically, Richey contends that Armstrong's finding that no accelerants were present and Custer's determination that Cryer's reasoning was faulty led the panel to conclude that the fire's cause was arson.

Although Richey alleges that his experts' testimony will prove he is "actually innocent" of the Collins murder, it remains unclear whether an actual innocence claim is available to a habeas petitioner. To support his claim, Richey cites *Herrera v. Collins*, 506 U.S. 390 (1993). In that case, the petitioner alleged, as here, that newly acquired evidence

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[26] Each of petitioner's claims is set forth in bold at the beginning of the discussion of that claim.

would exonerate him of the crime of which he was convicted. The petitioner argued that because he was innocent, his execution would offend the Eighth and Fourteenth Amendments of the Constitution. *Id.* at 398. The Court noted that "a claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Id.* at 404. At the close of the opinion, however, the Court reasoned, *arguendo*, that the execution of a truly innocent person would violate the Constitution, but opined that the threshold showing for such a case "would necessarily be extraordinarily high." *Id.* at 417. Finding that Herrera did not meet this abstract standard, the Court denied his actual innocence claim.

In the wake of *Herrera*, Circuit courts, unsurprisingly, have divided on whether to recognize a habeas petitioner's "free-standing" actual innocence claim, in *Carriger v. Stewart*, 132 F.3d 463 (9th Cir. 1997), for example the Ninth Circuit held that *Herrera* did recognize this claim. Adopting the *Herrera* dissent's standard for proving actual innocence, the Ninth Circuit determined that a habeas petitioner 'must go beyond demonstrating doubt about his guilt, and must affirmatively prove that he is probably innocent." Id. at 476 (citing *Herrara*, 506 U.S. at 442-44). Other circuits, however, have determined that the *Herrera* Court never held free-standing actual innocence claims were cognizable in a habeas review, and merely assumed that the execution of an innocent person would be constitutionally violative for argument's sake. *See, e.g., Sellers v. Ward*, 135 F.3d 1333, 1339 (10th Cir. 1998), *cert. denied*, 525 U.S. 1024 (1998) (holding free-standing actual innocence claim not a basis for obtaining a writ of habeas corpus); *Lucas v Johnson*, 132 F.3d 1069, 1074 (5th Cir. 1998) (holding language throughout *Herrera* opinion denying habeas petitioner's right to freestanding actual innocence claim controlling).

While the Sixth Circuit has yet to provide definitive guidance on whether a freestanding actual innocence claim is cognizable, it has noted that "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." *Lefever v. Money*, 225 F.3d 659 (Table), 2000 WL 977305. at *6 (6th Cir. July 6, 2000) (quoting *Herrera*,, 506 U.S. at 400). The court then went on to note that the *Lefever* petitioner's case also did not fall into the purported "*Herrera* exception" in which, as noted above, the Supreme Court theorized that the execution of a truly innocent person would be unconstitutional. *Id.* at *6 n.19.[27]

The Sixth Circuit found that assuming such an exception exists, the petitioner did not satisfy that "extraordinarily high" standard in that case. Rather than presenting new evidence, the court noted in *dicta*, the petitioner's "new evidence" was merely a reevaluation of the evidence presented during trial by experts of petitioner's choosing. The court went on to note that

> [w]hile defendant blames her trial counsel for failing to hire these experts and failing to bring out each and every medical point they have brought out years after her trial, this does not change the fact that the evidence does not likely constitute "newly discovered

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[27] One other district court within the Northern District of Ohio has determined that *Herrera* barred free-standing actual innocence claims. *Spirko v. Anderson*, No. 3:95CV7209, 2000 WL 1278383, at *19 (N.D. Ohio July 11, 2000). In that case, the court opined that a habeas court's sole responsibility lies in ensuring the state afforded the petitioner a constitutionally sound trial, not to correct errors of fact. *Id.* at *20.

> evidence," the type of evidence that may, in some circumstances, entitle a habeas applicant to an evidentiary hearing.

Id. at *6 n.18.

Similarly, Richey does not present new evidence but has merely employed new experts to examine the evidence the state adduced at trial. As he cannot prevail on a *Schlup* "gateway" actual innocence claim requiring a lower threshold of proof to meet the standard, then, *a fortiori*, Richey does not meet the theoretical "extraordinarily high" *Herrera* freestanding actual innocence claim, provided such a claim exists.

Finally, as respondent notes, this claim, as all others, is subject to a "reasonableness" review pursuant to § 2254(d)(1). Thus, pursuant to *Williams v. Taylor*, discussed *supra*, the Court must determine whether the Ohio Court of Appeals' decision was "contrary to, or involved an unreasonable application of clearly established Federal law." § 2254(d)(l). The Third District Court of Appeals determined:

> [A]ppelant does not establish a claim of actual innocence based upon his so-called "newly discovered evidence.' Even if the trial experts' analysis of the available data were erroneous, such error does not destroy the state's case against Appellant. Furthermore, the "newly discovered evidence" presented by Appellant does not by itself establish his actual innocence. The mere absence of accelerants in the articles tested is not conclusive proof that Appellant is innocent of the crime of arson. There is other evidence in the record which supports the verdict of the jury. Thus, we conclude that Appellant does not present a claim of actual innocence.

State v. Richey, No. 12-97-7, 1997 WL 722782. at *1 (Ohio Ct. App. Nov. 18, 1997). Because the Third District Court of Appeals did not unreasonably apply Supreme Court law, i.e., *Herrera*, to the facts of the case, this Court must defer to it. Consequently, the Court finds that Richey's first ground for relief is not well-taken.

Ground 2: To be convicted of aggravated murder under O.R.C. § 2903.01(B), the capital crime for which Richey was indicted, required proof of intent to cause the death of the person killed, and thus Richey's conviction based solely upon transferred intent violated his rights under the Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendments.

In this claim Richey asserts that the state unlawfully convicted him on a theory of transferred intent. Richey initially raised this claim during his *Murnahan* application. For the reasons stated in section VI. B. 2, *supra*, Richey has procedurally defaulted this claim.[28]

Out of an abundance of caution, however, the Court will consider the merits of this claim. In this claim, petitioner

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[28] In the Return of Writ, respondent correctly states that it is difficult to discern the nature of this claim. Respondent, and apparently petitioner, dealt with this claim as one regarding the sufficiency of the state's proof to convict Richey of capital murder. As respondent notes, however, this claim may be construed as a faulty indictment claim. The claim remains defaulted regardless of how the Court chooses to interpret petitioner's claim, however, because a defendant must raise faulty indictment objections prior to trial. Ohio R. Crim. P. 12(B)(2).

asserts that pursuant to Ohio Revised Code § 2903.01(D) a criminal defendant cannot be convicted of aggravated murder unless he murdered the person he intended to at the outset. The Ohio legislature amended this section in 1996. The section in effect during Richey's trial stated in pertinent part:

> (B) No person shall purposely cause the death of another or the unlawful termination of another's pregnancy while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, kidnaping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.
>
> * * *
>
> (D) No person shall be convicted of aggravated murder unless he is specifically found to have intended to cause the death of another. * * * If a jury in an aggravated murder case is instructed that a person who commits or attempts to commit any offense listed in division (B) of this section may be inferred, because he engaged in a common design with others to commit the offense by force or violence or because the offense and the manner of its commission would be likely to produce death, to have intended to cause the death of any person who is killed during the commission of, attempt to commit, or flight from the commission of or attempt to commit the offense, the jury also shall be instructed that the inference is nonconclusive, that the inference may be considered in determining intent, that it is to consider all evidence introduced by the **prosecution to indicate the person's intent and by the person to indicate his lack of intent in determining whether the person specifically intended to cause the death**

> **of the person killed**, and that the prosecution must prove the specific intent of the person to have caused the death by proof beyond a reasonable doubt.

Ohio Rev. Code § 2903.01 (emphasis supplied). The petitioner focuses on the emboldened language to assert that Ohio no longer recognizes the theory of transferred intent, but that the state must prove that a defendant intended to kill the actual victim to obtain an aggravated murder conviction.

Moreover, petitioner contends that because the indictment under which Richey was charged does not contain an allegation that Richey intended to kill Cynthia Collins, and because the state did not adduce, and admittedly cannot produce any evidence that Richey harbored an intent to kill Cynthia Collins rather than Candy Barchet and Mike Nichols, he is entitled to federal habeas relief.

As stated in the above procedural default analysis, the Court finds that this claim is not cognizable in a federal habeas court as it is one touching purely on state law. As the Sixth Circuit has stated, "[i]n a federal habeas corpus proceeding such as this one, we do not sit as a "'super' state supreme court" to judge whether the judge erred under state law. Rather, our task is to determine whether the violation rises to the level of a constitutional wrong." *Wilson v. McMacken*, 786 F.2d 216, 221 (6th Cir. 1986). *See also Allen v. Morris*, 845 F.2d 610, 614 (6th Cir. 1988)(holding habeas court must defer to state's own interpretation of state law); *Duffy v. Foltz*, 804 F.2d 50, 54 (6th Cir. 1986)(same).

In a factually similar case, the Seventh Circuit determined that the petitioner's claims that the state had abolished the theory of transferred intent was an issue best decided by the state. *Gilreath v. Hanks*, 95 F.3d 1154 (Table), 1996 WL 459929, at * 1 (7th Cir. Aug. 8, 1996). Although the court determined that the petitioner might have had a constitutional claim had the state convicted him for acts that were not criminal pursuant to state law, that was not the

case. *Id.* Similarly, Richey cannot argue persuasively that Ohio has abandoned the transferred intent theory when the Ohio Supreme Court explicitly stated in his case that it has not. Consequently, the Court determines that even if Richey had properly preserved his second ground for relief, it would not be cognizable in a federal habeas forum. In the context of addressing Richey's sufficiency of evidence claim, the Ohio Supreme Court explicitly stated that "[t]he doctrine of transferred intent is firmly rooted in Ohio law." 595 N.E.2d 915, 925 (Ohio 1992)(internal quotation marks and citations omitted.) Thus, the Court finds Richey's second ground for relief has no merit.

Ground 3: Because the State indicted Richey for specifically intending to cause the death of Cynthia Collins, but instead tried Richey for specifically intending to cause the deaths of Candy Barchet and/or Mike Nichols, the State constructively amended Richey's indictment in violation of the Fourteenth Amendment.

Ground 4: The three-judge panel convicted Richey on a charge that the State did not include in the Bill of Particulars and on which the State did not present evidence at trial, thereby violating Richey's rights under the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments.

In his third and fourth grounds for relief. Richey contends that the state violated his constitutional rights because he was not convicted of the crime with which he was charged. Specifically, Richey alleges that while the indictment charged him with the specific intent to kill Cynthia Collins, the Bill of Particulars charged him with the specific intent to kill Candy Barchet and/or Mike Nichols. Because he was indicted on one theory of intent but

convicted for another, Richey asserts this was an unconstitutional constructive amendment to the indictment. Moreover, Richey argues he did not have sufficient notice of which theory of intent the state meant to prove during trial, thus, he could not adequately prepare for his defense.

Similar to the second ground for relief, respondent argues that claims three and four are procedurally defaulted because they were not raised on direct appeal. Instead, they were raised for the first time during petitioner's *Murnahan* petition. Richey counters that ineffective assistance of appellate counsel provides the "cause" necessary to excuse this procedural default. As stated above, however, Richey cannot successfully assert this claim. Therefore, these claims are procedurally defaulted.

In performing a merit review of a constructive amendment to an indictment claim, a habeas court must be mindful of several factors. In *Watson v. Jago*, 558 F.2d 330 (6th Cir. 1977), the state had indicted the petitioner on first-degree premeditated murder. During trial, however, the state presented evidence of felony murder. After defense counsel's objections, the trial court charged the jury only on premeditated murder. In reversing the district court's denial of the writ, the Sixth Circuit held the presentment of felony murder evidence was a constructive amendment that impermissibly prejudiced the petitioner even though the court charged only on premeditated murder.

The Sixth Circuit noted that constructive amendment prohibition rests on the Fifth Amendment right to a grand jury indictment before one can be held for a capital trial. *Id.* at 336. Because this Fifth Amendment guarantee has never been incorporated into the Fourth Amendment, the Supreme Court has held that the Due Process Clause of the Fourteenth Amendment does not require a grand jury indictment in a state prosecution. *Id.* at 337 (citing *Hurtado v. California*, 110 U.S. 516 (1884)). Thus, the court concluded, "with respect to amendments, federal courts have viewed [an

indictment's] legality as primarily a matter of state law." *Id.* (internal quotation marks and citations omitted).

Accordingly, the *Watson* court examined Ohio's indictment amendment law, which is detailed in Ohio Revised Code § 2941.30.[29] From that portion of the statute the Sixth Circuit concluded that the state had constructively amended the indictment because premeditated murder was a separate crime from felony murder.

The court went on to note that although a habeas court must entertain a constructive amendment claim by ascertaining state law, this issue is grounded in three basic federal constitutional principles: notice, double jeopardy, and effective assistance of counsel. Thus, this Court need only consider whether the faulty indictment violated these federal law guarantees.

To be on firm constitutional ground, an indictment must pass a two-prong test:

> [F]irst, the indictment must set out all of the elements of the charged offense and must give notice to the defendant of the charges he faces; second, the indictment must be sufficiently specific to enable the defendant to plead double jeopardy in a subsequent proceeding, if charged with the same crime based on

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[29] That statute reads:

> The court may at any time before, during, or after a trial amend the indictment, information, or bill of particular, in respect to any defect, imperfection, or omission in form of substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged. * * *

Ohio Rev. Code § 2941.30.

the same facts.

United States v. Martinez, 981 F.2d 867, 872 (6th Cir. 1992)(citing *Russell v. United States*, 369 U.S. 749, 763-64 (1962)). "The state legislature's definition of the elements of the offense is usually dispositive." *Hoover v. Garfield Heights Mun. Court*, 802 F.2d 168, 173 (6th Cir. 1986), *cert. denied*, 480 U.S. 949 (1987). Moreover, criminal defense counsel must be sufficiently apprized of the offense with which his client is charged to enable counsel to adequately prepare a meaningful defense. *See Olsen v McFaul*, 843 F.2d 918, 931 (6th Cir. 1988)(determining vague indictment and numerous state alterations to it did not permit defense counsel to comprehend factual circumstances surrounding charge).

As instructed by *Watson*, this Court must look to state law to determine the validity of petitioner's constructive amendment arguments. In addition to the indictment amendment statute quoted above, the Court examines the crime with which Richey was charged, felony murder, to determine whether the indictment was constructively amended by the proofs supplied during trial. The elements of aggravated murder at the time Richey was convicted were:

> (1) Purposefully causing another's death.
>
> (2) while committing * * *
>
> (3) Kidnaping, rape, aggravated arson, arson, aggravated robbery, robbery, aggravated burglary or escape.

State v. Richey, No. 12-87-2, 1989 WL 156562, at *2 (Ohio Ct. App. Dec. 28, 1989)(quoting Ohio Revised Code § 2903.01(B)). Upon reviewing the statute, it appears that petitioner's claim is essentially that the state did not provide

sufficient notice of the means by which it would prove the "purposefully" or state of mind element of the crime.

In Richey's case, the indictment stated that Richey "did purposely cause the death of another, to wit: Cynthia Collins." (Respondent Ex. 1.) Several months prior to the commencement of trial, however, Richey's counsel requested a bill of particulars pursuant to Ohio Rule of Criminal Procedure 7(E) . This bill not only provided petitioner with the factual circumstances the state intended to prove during its case, but noted that:

> Kenneth Richey at the time that he was committing an aggravated arson was attempting to cause the death of Candy Barchet and Mike Nichols who were in the apartment immediately below the apartment of Hope Collins. The purpose to cause the death of another, to wit: Cynthia Collins arises from the intent of the Defendant to cause the death of Candy Barchet and/or Mike Nichols.

(Respondent Ex. 10.)

This Court is satisfied that Richey's indictment was not unconstitutionally amended. First, the Court notes that, pursuant to Ohio law, the doctrine of transferred intent is a permissible means by which the state can prove the "purposefully" element to aggravated murder. *See State v. Sowell,* 530 N.E.2d 1294, 1305 (Ohio 1988) (holding indictment accurate in conviction for murder with prior calculation and design under theory of transferred intent); *see also State v. Smith,* 624 N.E.2d 1114, 1116 (Ohio 1993)(finding "purposefully" element of murder proved by either theory of specific or transferred intent). Thus, pursuant to state law, an indictment is not "amended" when the state chooses to satisfy the "purposeful" element by transferred intent rather than specific intent to kill the victim.

Additionally, the federal rights violations that inhere

in a constructive amendment to an indictment are not present here. First, the crime with which Richey was charged, unlike the *Watson* petitioner, at all times was aggravated murder with a felony-murder death penalty specification. Moreover, the state filed the bill of particulars on July 24, 1986 but petitioner's trial did not begin until January 5, 1987. Thus, Richey and his counsel were well aware that the state intended to pursue a transferred intent theory at trial. Finally, based on the defense Richey's counsel provided, it was clear that counsel knew, and prepared for, a defense based on a transferred intent theory.

During the state's opening argument, the state clearly set forth its transferred intent theory by noting that Richey had an "obsessive" relationship with Candy Barchet. (Tr. Trans. at 23.) Defense counsel rebutted this inference by attacking the credibility of the people who attended the Collins party. Defense counsel also cross-examined Hope Collins, eliciting testimony that Richey was not overtly upset when Barchet ended their relationship. Based on these defense tactics, it is clear that Richey was on notice, and defense counsel prepared a defense based on the state's transferred intent theory. As such, the Court finds that Richey and his counsel were on notice of the means by which the state would attempt to prove the "purposeful" element of the crime. Because Richey's federal rights were not violated; the Court concludes that grounds three and four are not well-taken.[30]

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[30] While raised in neither parties' briefs, the United States Supreme Court's recent opinion in *Apprendi v. New Jersey,* – U.S. –, 120 5.0. 2348 (2000), will be addressed and distinguished. In *Apprendi,* the Court concluded because New Jersey increased a defendant's sentence once it determined that the crime for which a defendant was convicted was motived by racial bias that this was a sentence enhancement that is an unconstitutional amendment to an

Ground 5: The State's failure to record the grand jury proceedings violated Richey's rights under the Fifth, Sixth and Fourteenth Amendments, and Richey was harmed as a result of this error because it deprived him of the ability to prove that Count 1 of the Indictment was constructively amended.

In his fifth ground for relief, Richey contends that the state's failure to record the grand jury proceeding prejudiced him because it was the means by which Richey could prove the state constructively amended Count 1 of the indictment. Additionally, Richey contends that numerous eyewitness

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indictment. The *Apprendi* Court held that "[o]ther than the fact of a prior conviction, any fact that increased the penalty for a crime beyond the statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 2356.

In one recent Northern District of Ohio opinion the court granted a writ of habeas corpus to a habeas petitioner whose conviction rested on a faulty indictment. *Esparza v. Anderson*, No. 3:96CV7434 (N.D. Ohio Oct. 13, 2000). In that case, the faulty indictment omitted language that raised an aggravated murder charge pursuant to Ohio Rev. Code § 2903.01(B), which is punishable by life imprisonment, to a conviction in which the petitioner became death-penalty eligible.

It is obvious that neither case has applicability in Richey's faulty indictment allegations. Whether the state obtained a conviction based on Richey's specific intent to kill Cynthia Collins to a theory of transferred intent, the death penalty was correctly identified in the indictment and proved beyond a reasonable doubt during trial.

testimony procured during the grand jury proceeding was subsequently found persuasive by the three-judge panel. Thus, Richey alleges, without further explanation, their grand jury testimony was important to the defense.

The Ohio Supreme Court partially addressed this claim on direct appeal. In Proposition of Law XIII, Richey asserted that grand jury testimony was important to the defense to explore the possibility of inconsistent eyewitness testimony. The Ohio Supreme Court was unpersuaded by this claim. In its opinion the court noted:

> Richey establishes no basis at trial for any particularized need, and his general assertions do not establish a particularized need now. 'Grand jury proceedings are secret, and an accused is not entitled to inspect grand jury transcripts * * * unless the ends of justice require it and theme is a showing by the defense that a particularized need for disclosure exists * * *.' *State v. Greer* (1981), 66 Ohio St. 2d 139, 20 O.O.3d 157, 420 N.E.2d 982, paragraph two of the syllabus.

State v. Richey, 595 N.E.2d 915, 927 (Ohio 1992). Thus, the Ohio Supreme Court already has partially rejected Richey's claim.

This claim ultimately must fail, however, because Richey asserts no claim cognizable for federal habeas relief. To be entitled to relief, a federal habeas petitioner must allege a violation of the Constitution, laws or treaties of the United States. 28 U.S.C. § 2241; *Pulley v. Harris*, 465 U.S. 37, 41 (1984). In the instant case, Richey makes no such claim. Although Richey correctly notes that Ohio law requires the recordation of grand jury proceedings in felony cases, *State v. Grewell*, 543 N.E.2d 93, 98 (Ohio 1989), that decision was based purely on Ohio Rule of Criminal Procedure 22. The *Grewell* court noted that its decision

specifically did not rest on federal constitutional grounds. *Id.* at 97. Moreover, the Sixth Circuit has stated that although it is the preferred practice in federal courts to record grand jury hearings, neither the Constitution nor any federal statute require it. *United States v. Battisti*, 486 F.2d 961, 963 (6th Cir. 1973). *See also United States v. Barone*, 584 F.2d 118, 125 (6th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979)(noting no federal mandate to record proceedings); *United States v. Perkins*, 383 F. Supp. 922, 929 (N.D. Ohio 1974)(same). Because Richey's Fifth Ground for Relief does not involve a federal law violation, this Court finds it is not well-taken.

Ground 6: The charge against Richey of aggravated murder was technically defective, and resulted in ambiguous verdict in violation of Richey's right to a unanimous verdict as guaranteed by the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments.

In his sixth ground for relief, Richey asserts that his right to a unanimous verdict was infringed because of the discrepancy between the indictment, bill of particulars, and the verdict as to the theory of intent under which the state tried him for aggravated murder. Because the verdict does not indicate the panel reached a unanimous decision on whom Richey intended to kill Richey asserts, he cannot be convicted pursuant to the aggravated murder statute. He claims that, pursuant to state statute, he cannot be indicted and convicted for specifically intending to kill Cynthia Collins when the bill of particulars alleged a transferred intent theory.[31]

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[31] Richey's indictment and bill of particulars were quoted *supra* at 60-61. The verdict reads in relevant part:

Respondent alleges this claim is procedurally defaulted because petitioner raised this claim for the first time during his *Murnahan* proceeding. As stated above, Richey asserts ineffective assistance of appellate counsel as "cause" to excuse this default but cannot successfully do so. Consequently, this claim is procedurally defaulted.

The Court notes that, as stated above, any alleged irregularities pursuant to state law cannot be redressed in this proceeding. Any federal concerns raised by the discrepancy between the indictment and bill of particulars were raised and decided *supra* in grounds three and four. Thus, the Court need only address the issue of whether the verdict unanimously convicted Richey of aggravated murder in this ground for relief.

The United States Supreme Court addressed the unanimity issue in *Schad v. Arizona*, 501 U.S. 624, 632 (1991). The Court held that a jury is not required to specifically find under which theory of mens rea it rested its conviction. In that case, the state alleged during trial that the defendant was guilty of murder either under a premeditation theory or a felony murder theory. The defense rested on the strategy that the state had proved, at most, that the defendant

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> The defendant, Kenneth Richey, having been found guilty beyond a reasonable doubt on January 8, 1987, of Count One of the Indictment, Aggravated Murder, R.C. 2903.01(B), to wit: that on or about June 30, 1986 and in Putnam County, Ohio, that Kenneth Richey did purposely and with specific intent cause the death of another, to wit Cynthia Collins, while committing or attempting to commit, or while fleeing immediately after committing, or attempting to commit an Aggravated Arson, R.C. 2929.02(A)(I).

Respondent Ex. 44.

committed robbery. On appeal, the Court concluded that the petitioner had wrongly framed the issue, asserting that his right to a unanimous jury verdict had been violated when, in fact, the issue was whether it is constitutionally permissible for a jury to reach a unanimous verdict based on alternative findings. *Id.* at 630. The Court answered the question in the affirmative. Noting prior jurisprudence that permitted a jury to convict on alternate theories of the criminal act, the Court found "no reason . . . why the rule that the jury need not agree as to mere means of satisfying the actus reus element of an offense should not apply equally to alternative means of satisfying the element of mens rea." *Id.* at 632. Accordingly, the Court upheld the conviction.

Similarly, Richey's conviction will stand. Although Richey attempts to raise this issue as one consisting of a non-unanimous verdict, the true issue, as in *Schad*, is whether the panel could permissibly convict Richey on a transferred intent, rather than a specific intent theory. The Supreme Court has concluded it may. Thus, the Court determines that Richey's sixth ground for relief is without merit.

Ground 7: Richey's due process rights under the Fifth and Fourteenth Amendments were violated when the trial court incorrectly informed Richey, nearly one month before trial, that his final opportunity to exercise his right to a jury trial would be that day.

In Richey's seventh ground for relief, he contends that his due process rights were violated because he was denied the right to a jury trial. Richey essentially argues two issues in this ground for relief: First, he maintains that his jury waiver was not "knowing, voluntary or intelligent" because the presiding judge never told him that a single juror could prevent the death penalty. Second, Richey asserts that he was unconstitutionally coerced into waiving his jury trial

rights when the presiding trial judge informed him during a December 12, 1986 hearing that he would have to decide that day whether or not he would withdraw his jury waiver.

Respondent alleges this claim is procedurally defaulted because Richey first raised it during his *Murnahan* proceedings. As stated in section VI., B., 2, *supra*, this Court agrees.

An intelligent and voluntary waiver of the right to a jury trial is valid, and a conviction obtained after such a waiver is not constitutionally infirm. *Sinistaj v. Burt*, 66 F.3d 804, 807 (6th Cir. 1995)(citing *Patton v. United States*, 281 U.S. 276 (1930)). "[A] trial court need not conduct a particularly detailed oral inquiry before finding that a waiver is knowing and voluntary." *Cooey v. Anderson*, 988 F. Supp. 1066, 1078 (N.D. Ohio 1997)(citing *United States v. Martin*, 704 F.2d 267 (6th Cir. 1983) and holding that "there is no constitutional requirement that a court conduct an on the record colloquy with the defendant prior to the jury trial waiver."). Rather, the trial court should merely "inform defendants of the benefits and burdens of waiving one's right to jury trial." *Cooey*, 988 F. Supp. at 1079.[32]

During a December 12th hearing, the court informed Richey of the rights he was waiving:

The Court: As it relates to a waiver of a jury, I take it on behalf of the Defense that you have explained

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[32] The Sixth Circuit suggested, but did not demand, that "a defendant . . . be informed that a jury is composed of 12 members of the community, [that] he may participate in the selection of jurors, [that] the verdict of the jury must be unanimous, and that a judge alone will decide guilt or innocence should he waive his jury trial right." *Martin*, 704 F.2d at 274-75.

to your client that he has a right to try this case to a jury, have you not?

Counsel: Yes, Your Honor.

The Court: In this case, Mr. Richey, unlike some other cases there are certain aspects of the jury that would ultimately try this ease that are different than normal criminal cases. For starters, you can request what is called a special venire which basically means that through the clerk's office and ultimately through the sheriffs department, individuals 75 in number are contacted directly to come directly to this courtroom to sit as jurors in the case of the State of Ohio versus Richey.

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You have an absolute right to a trial by a jury if you choose a trial by a jury. Some time ago in conversation with your attorney, it is my understanding that he explained those rights to you -

Defendant: That's right.

(Hearing Tr. 12-14.) Thereafter, the court questioned whether it was, in fact, the defendant's signature on the jury waiver notice. Richey responded affirmatively.

It is clear from the courtroom colloquy that Richey made a voluntary and informed decision when waiving a jury trial. Although the trial court did not expressly inform Richey of the consequences of a non-unanimous jury on his sentencing, that fact alone does not alter the constitutionality of the proceeding. The Sixth Circuit does not require a

detailed explanation of the capital trial process. Neither counsel nor Richey expressed any objection to the waiver. Thus, Richey's bald assertions now that his decision was not knowing, voluntary and intelligent is unimpressive.

Furthermore, while the trial court did request that counsel notify the court of any changes in Richey's waiver decision, that request was merely to prepare for special venire notices if so required. The court did not demand a final decision, but merely expressed:

> Mr. Richey has been explained that he has a right to a trial by jury if he chooses it. He has waived that particular right. I would ask that the attorneys counsel Mr. Richey and let me know by the end of these motion hearings whether or not that is still his pleasure. If that is not his pleasure or if there is a feeling that there is going to be a problem in that area, I can cut an order ordering that a venire be sent out and that the jurors be available come January 5th.

(Hearing Tr. 15-16.) Thus, the court's request came only as a means of timely preparing for trial. Neither Richey nor his counsel subsequently attempted to revoke the jury waiver. Thus, the Court finds that Richey's rights to a jury trial were not infringed and that ground seven is not well-taken.[33]

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[33] Richey also argues that the hearing court did not comply with Ohio Rev. Code § 2945.05, which allows the withdrawal of a jury waiver at any time prior to trial. Because Richey's federal constitutional rights were kept intact during the hearing, the Court determines that it cannot hear this claim because it rests solely on state law and was not fundamentally unfair to rise to a due process violation. *Estelle v. McGuire*, 502 U.S. 62, 67 (1991).

Ground 8: Richey's rights under the Sixth and Fourteenth Amendments to trial by an impartial tribunal were violated when the three-judge panel failed to recuse themselves after they considered whether Richey was a menace and ordered him to be shackled prior to trial.

Richey asserts in his eighth ground for relief that the three-judge panel was inherently prejudiced against him during trial because it previously had determined he should be shackled. Hence, he argues, the panel should have recused itself.

Initially, the Court notes that respondent argues this claim is procedurally defaulted because petitioner failed to object to the panel before trial. Petitioner asserts that the Ohio Supreme Court addressed the merits of the claim and did not clearly and expressly declare it procedurally defaulted. Although the Ohio Supreme Court was somewhat ambiguous about whether it barred this claim on procedural grounds, it appears the court conducted a plain-error analysis and alternatively addressed the claim on the merits. The court noted that, "Richey accepted the panel and raised this issue neither at trial nor before the court of appeals. Hence, we need not consider this issue." *State v. Richey*, 595 N.E.2d 915, 921 (Ohio 1992)(citations omitted). Prior to this pronunciation, however, the court fully addressed the merits of the claim.

In instances where a state court is ambiguous as to whether it is barring a claim on state procedural grounds, a habeas court should address the merits of the claim. *Harris v. Reed*, 489 U.S. 255 (1989). In *Harris*, the Court determined that the "plain statement" rule first articulated in the direct review context in *Michigan v. Long*, 463 U.S. 1032 (1983) should also be applied on habeas review.

As stated in section VI., B., 3., *supra*, however, a state court does not waive its right to exclusively decide a

claim when it issues an alternative holding. *Seymour v. Walker*, 224 F.3d 542, 557 (6th Cir. 2000). Consequently, the Court determines that Richey has procedurally defaulted this claim. Richey summarily asserts that ineffective assistance of trial counsel can serve as "cause" to excuse the default. As the Court finds that none of petitioner's ineffective assistance of counsel claims possess merit, *see* claim twenty *infra* at 103, he has no basis on which to assert cause nor can he demonstrate prejudice. Thus, the Court need not address the merits of this claim.

If the Court were to address the merits of the claim, however, Richey asserts that because of the panel's decision to shackle him, he was denied the right to a fair trial. Additionally, Richey claims that the panel remained silent on the reasons for shackling him and did not attempt to use an alternative means to keep him subdued.[34] The Supreme Court has determined that although compelling a defendant to wear shackles during trial is "inherently prejudicial," security interests may dictate shackling but only as a last resort. *Illinois v. Allen*, 397 U.S. 337, 344 (1970). Although the Sixth Circuit has not so held, some circuit courts have required a trial court to use the least restrictive means of securing a courtroom before shackling the defendant. *See, e.g., Duckett v. Godinez*, 67 F.3d 734, 748 (9th Cir. 1995), *cert. denied*, 522 U.S. 848 (1997).

Richey's assertions must fail because they are undermined by his own actions. As the Ohio Supreme Court noted:

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[34] The Court notes that Richey, in effect, amended his Petition by asserting the above portion of claim eight in the Traverse. In the Petition, Richey asserts only that the three-judge panel should have recused itself after determining Richey's dangerousness.

> Richey told Deputy Roy Sargent on November 19 that "Randy Bassinger [the prosecutor] was a dead man" and "whoever testified against him had better hope he's six feet under." On August 17, Richey told Deputy Mike Ball to take a message to Randy Bassinger, "that when he got out he was going to cut his throat."

State v. Richey, 595 N.E.2d 915, 920 (Ohio 1992). It is no surprise that the three-judge panel subsequently determined, in response to die prosecutor's motion, that Richey posed a threat to courtroom security. The court determined that Richey's hands could remain free but that his feet should be shackled. Richey's threats against people who would be present in the courtroom clearly outweigh any prejudice he may have suffered.

Richey next argues that the three-judge panel should have recused itself after reviewing information that led it to conclude Richey was dangerous. By drawing this conclusion prior to trial. Richey contends, the judges became prejudiced against him. As the Ohio Supreme Court stated in its plain-error review of this claim:

> Even though the judges had been exposed to evidence about Richey's threats, they did not need to recuse themselves . . . . In this case, . . . , the trial judges are presumed not to have improperly used the evidence about threats in their subsequent deliberations. *State v. Post*, *supra*. Nothing in the record indicates they did so, and the evidence of guilt is otherwise compelling.

Id. at 921. Nothing in the Ohio Supreme Court's opinion is contrary to federal law. Indeed, Richey can point to no law that requires a judge to recuse his or herself after making a shackling determination. For the foregoing reasons, the Court

finds Richey's eighth ground for relief is without merit.

Ground 9: Because new scientific evidence establishes that Richey was convicted on the basis of false and unreliable scientific evidence, his conviction and sentence violate the Fourteenth Amendment.

In this claim for relief, Richey argues that the evidence proffered by Armstrong and Custer proves that Richey was convicted on the basis of false and unreliable testimony. Because he has "conclusively demonstrated" that the scientific evidence presented during trial was false, Richey maintains that the state violated his Fourteenth Amendment rights.

Respondent asserts that this claim is procedurally defaulted. It was not raised during his direct appeal but was raised, for the first time, in his post-conviction relief petition. In that proceeding, the trial court determined that this claim could have been raised on direct appeal and, thus, was barred by *res judicata.* (Respondent Ex. 73 at 5.) Richey counter-argues that, pursuant to *State v. Hamilton*, No. 3015, 1993 Lexis 6289 (Ohio Ct. App. Dec. 29. 1993), this Court should determine that Richey's scientific evidence was based on facts *de hors* the record and consequently should not bar federal habeas review.

Richey's assertion, however, is unpersuasive. First, the determination that the evidence necessary to secure a post-conviction hearing was based on evidence *de hors* the record is clearly a matter of state court determination. Moreover, the unpublished *Hamilton* opinion has questionable precedential value on the Ohio post-conviction court, much less on this Court. Because the post-conviction court determined this claim violated the *Perry* rule and the appellate and Ohio Supreme Court accepted that finding, this Court finds this ground for relief procedurally defaulted.

Were the Court to address the claim on the merits, it would fail. Richey can point to no federal law instructing a habeas court to consider a claim in which post-trial expert reports that undercut the credibility of trial experts violates his Fourteenth Amendment rights. As stated in section VI., B, 4, *supra*, Richey's experts certainly undermine the state's arson evidence but fall far short of conclusively demonstrating its falsity, as he suggests. Absent more compelling evidence that the state introduced false and unreliable evidence during trial, this claim lacks merit.

Ground 10: There was insufficient evidence to convict Richey of the crimes with which he was charged or for which he was tried, and thus Richey's conviction violated the Eighth and Fourteenth Amendments.

In his tenth ground for relief, Richey alleges that the evidence adduced during trial was insufficient to convict him. Richey proffers this allegation based on two grounds: First, Richey contends that there was insufficient evidence to support his conviction based on Richey's specific intent to kill either Cynthia Collins or Candy Barchet and Mike Nichols. Second, Richey asserts that the state presented circumstantial evidence during trial, but no direct evidence to convict him. These deficiencies, Richey argues, forced a conviction in violation of his Eighth and Fourteenth Amendment rights.

Initially, the Court notes that respondent asserts that Richey's first point is procedurally defaulted. Richey did raise an insufficiency of evidence claim to the Ohio Supreme Court, although that claim asserted only that his conviction rested on solely circumstantial evidence. Thus, that portion of his tenth claim is not procedurally defaulted. Richey did raise the transferred intent issue in an insufficiency of evidence context during his *Murnahan* proceeding. For reasons stated

above, however, that portion of claim ten is procedurally defaulted.

This claim is a re-assertion of the issue Richey raised in his Petition in his second ground for relief *supra*. The Court already has addressed the issue of transferred intent and found it to be without merit. Thus, it is unnecessary to revisit that issue.

In the second portion of his claim in which Richey complains he was convicted only on the basis of circumstantial evidence, Richey asserts that this Court should adopt a standard of review pursuant to Ohio common law. The United States Supreme Court and Sixth Circuit Court of Appeals dictate otherwise. In *Jackson v. Virginia*, 443 U.S. 307 (1979), the Supreme Court determined the correct standard of review that a habeas court must employ. It concluded that the habeas court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319.

In reviewing this standard, the Sixth Circuit determined in *York v. Tate*, 858 F.2d 322, 330 (6th Cir. 1988), *cert. denied*, 490 U.S. 1049 (1989) that a habeas court must apply only the *Jackson* standard when reviewing a sufficiency of evidence claim, rather than be guided by Ohio common law. In *York*, the district court had granted a writ of habeas corpus based on Ohio common law, determining that a reasonable juror could find the defendant not guilty because the state had convicted solely on circumstantial evidence. In reversing the district court, the Sixth Circuit raised several issues. First, it noted that the *Jackson* standard was irreconcilable with Ohio common law.[35] The court went on

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[35] At the time *York* was decided, Ohio common law instructed state courts that when reviewing a case "where circumstantial evidence alone is relied upon to prove an

to note the general view that a conviction based on circumstantial evidence is a sound means by which to convict and that "[c]ircumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." *Id.* at 328 (quoting *Michalic v. Cleveland Tankers, Inc.*, 364 U.S. 325, 330 (1960)) (internal quotation marks omitted). The court determined that the Ohio common law rule was not required by the federal constitution. It concluded that a district court sitting in habeas review must apply the standard as set forth in *Jackson.*

In complying with this mandate, this Court must limit itself to evidence adduced during trial as a "sufficiency of the evidence review authorized by *Jackson* is limited to 'record evidence.' *Jackson* does not extend to non-record evidence, including newly discovered evidence." *Herrera v. Collins*, 506 U.S. 390, 402 (1993)(citing *Jackson*). In viewing that evidence pursuant to the *Jackson* standard, the Court finds Richey's claim cannot withstand that review. Although only circumstantial evidence was presented at trial and that evidence was, as Richey notes, occasionally conflicting, there was more than ample evidence adduced during trial to support a conviction. The scientific evidence, presentation of a motive for the crime, testimony regarding Richey's prior threats to burn the building, and the fact that Richey was the last person to enter the apartment all could lead a reasonable juror to conclude that Richey was the perpetrator of the crime. Consequently, the Court determines that Richey's tenth ground for relief is not well-taken.[36]

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element essential to a finding of guilt, [that] it must be consistent only with the theory of guilt and irreconcilable with any reasonable theory of innocence." *State v. Kulig.* 309 N.E.2d 897, 899 (Ohio 1974).

[36] A recent Sixth Circuit decision suggests that the *Jackson* standard was modified by 28 U.S.C. § 2254(d). *Starr v.*

Ground II: Richey was convicted on the basis of a standard of proof below that required by the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments.

Richey argues in his eleventh ground for relief that he was convicted under a standard of proof not constitutionally permissible under *In re Winship*, 397 U.S. 358 (1970). Specifically, Richey presumes that the three-judge panel utilized the definition of reasonable doubt delineated in Ohio Revised Code § 2901.05(D). That statute provides:

> (D) "Reasonable doubt" is present when the jurors, after they have carefully considered and compared all the evidence, cannot say they are firmly convinced of the truth of the charge. It is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. "Proof beyond a

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Mitchell, No. 98-4541, 2000 WL 1529807 (5th Cir. Oct. 6, 2000). In that case, the Sixth Circuit analyzed a habeas petitioner's insufficiency of evidence claim pursuant to § 2254(d)(1), holding that "a writ of habeas corpus may be issued for evidence insufficiency only if the state court adjudication 'resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law . . . or was based on 'an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" *Id.* at *3 (quoting § 2254). Because petitioner's claim cannot withstand scrutiny under the *Jackson* standard, then, *a fortiori*, the more stringent § 2254(d) standard of review cannot afford him relief.

> reasonable doubt" is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his own affairs.

Ohio Rev. Code § 2901.05(D).

Respondent contends that this claim is procedurally defaulted because Richey raised it for the first time during his application to re-open his direct appeal. As stated in section VI., B. 2., *supra*, Richey cannot use ineffective assistance of appellate counsel to excuse the procedural default. Thus, this Court need not address the merits of the claim.

Although Richey asserts a number of Supreme Court cases to buttress his argument, this claim must fail. The Sixth Circuit analyzed this statutory definition and upheld its constitutionality. *Thomas v. Arn*, 704 F.2d 865, 869 (6th Cir. 1983). More recently, the Sixth Circuit has affirmed its holding in *Thomas*. *See Byrd* v. *Collins*, 209 F.3d 486, 527 (6th Cir. 2000) *petition for cert. filed* Oct. 6, 2000. (holding trial judge's reasonable doubt instruction constitutional because it was almost the same language found in § 2901.05); *Scott v. Mitchell*, 209 F.3d 854, 884 (6th Cir. 2000)(noting district court correctly relied on *Thomas* opinion and Sixth Circuit's own affirmance of that opinion in *Byrd*). While respondent cites these cases in the Return of Writ, Richey did not address them in the Traverse, principally because he cannot evade their authority. The panel's presumed reliance on Ohio's statutory definition of reasonable doubt was constitutionally sound. Thus, the Court determines that Richey's eleventh ground for relief is without merit.

Ground 12: Richey's right to a fundamentally fair trial as guaranteed by the Fifth, Ninth and Fourteenth Amendments was violated when the State introduced irrelevant evidence that Richey allegedly made verbal threats against the

prosecutor and potential witnesses.

Ground 15: Richey's right to a fundamentally fair trial as guaranteed by the Fifth, Ninth and Fourteenth Amendments was violated when the trial court admitted an irrelevant, inflammatory, and highly prejudicial letter in the presentence investigation report.

Because both of the above claims involve admission of evidence issues, it is logical to group them together. Before addressing either claim, the Court will briefly review the scope of habeas review regarding a trial court's admissibility of evidence decision.

Alleged errors in the admission of evidence, absent some other constitutional violation, are not enough to entitle a petitioner to relief under § 2254. Review of a state court's evidentiary rulings on federal habeas review is very limited. *Waters v. Kassulke*, 916 F.2d 329, 335 (6th Cir. 1990). As one court stated, "[e]rrors by a state court in the admission of evidence generally are not reviewed by a habeas court 'unless they so perniciously affect the prosecution of a criminal case as to deny the defendant the fundamental right to a fair trial." *Skaggs v. Parker*, 27 F. Supp.2d 952, 985 (W.D. Ky. 1998), *rev'd on other grounds*, 230 F.3d 876 (6th' Cir. 2000)(citing *Kelly v. Withrow*, 25 F.3d 363, 370 (6th Cir. 1994)). *See also Cooper v. Sowders*, 837 F.2d 284, 286 (6th Cir. 1988)(stating "that errors in the application of state law, especially rulings regarding the admission or exclusion of evidence, are usually not to be questioned in a federal habeas corpus proceeding") (citation omitted).

"To determine whether the admission of certain evidence violated the defendant's constitutional right to a fair trial, the habeas court must first determine whether the evidence is relevant or probative of an issue on which the prosecution bears the burden of proof." *Skaggs*, 27 F. Supp.

at 985 (citing *Estelle v. McGuime.* 502 U.S. 62, 69-70 (1991)). If the Court concludes that the evidence was relevant to an essential element of the state's case, its inquiry is over; by definition, there has been no due process violation. Mindful of the above restrictions to which this Court must adhere, the Court will now address petitioner's claims.

Ground 12:

In her Return of Writ, respondent asserts this claim is procedurally defaulted. Although petitioner raised this claim to the Ohio Supreme Court on direct appeal, that court reviewed this claim pursuant to a plain error analysis. *State v. Richey*, 595 N.E.2d 915, 921 (Ohio 1992) ("Although Richey moved to suppress these statements, he did not object specifically to evidence of threats. Hence, the issue is waived except for plain error."). As stated above, in section VI., B.3., *supra.* a plain error analysis, even if accompanied by an alternative review on the merits, does not constitute a state's wavier of its procedural default. Consequently, the Court finds this claim procedurally defaulted. Petitioner asserts that ineffective assistance of counsel can serve as cause to excuse the procedural default. As explained in ground for relief 20, *infra*, petitioner's ineffective assistance of counsel claims lack merit. Thus, petitioner cannot show cause and prejudice to overcome the procedural default.

Richey's claim also fails on the merits. In his twelfth ground for relief, Richey asserts that the trial court improperly admitted evidence of Richey's verbal threats against the prosecutor and witnesses who would testify against him. While in police custody, Richey told an officer that the prosecutor "was a dead man" and that "whoever testified against him had better hope he's six feet under." *State v. Richey*, 595 N.E.2d 915, 920 (1992). Additionally, Richey asked another officer that he relay a message to the prosecutor "that when he got out he was going to cut his

throat." *Id.*

In its plain error analysis, the Ohio Supreme Court cogently analyzed this claim, finding no error:

> Richey's threats reflect a consciousness of guilt, similar to evidence of flight to avoid prosecution, or efforts made to cover up a crime or intimidate witnesses. *See State v. Eaton*, (1969), 19 Ohio St.2d 145, O.O.2d 188, 249 N.E.2d 897 (flight from justice may indicate a consciousness of guilt); *Cleveland v. McNea*, (1952), 158 Ohio St. 138, 142, 48 O.O. 68, 70, 107 N.E.2d 201, 203 (suppression of adverse evidence constitutes a prejudicial circumstance of much weight).

Id. at 921 (further citations omitted). Richey cannot cite any Supreme Court or other federal law that would make the Ohio Supreme Court's findings unreasonable. Instead, Richey advances several fruitless arguments.

Citing *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974), Richey asserts that the admission of the threatening evidence so infected the proceeding that it denied him the right to a fair trial. This case is inapposite, however, as *Donnelly* addresses the sole issue of prosecutorial comments during closing arguments and whether the trial court's curative instruction obliterated possible harm arising therefrom. At no point in the *Donnelly* opinion does the Supreme Court address, as is presented here, an admission of evidence issue.

Richey then attempts to bolster his claim by asserting that the admission of "other acts" evidence violated Ohio Rule of Evidence 404(b), which Ohio courts have interpreted to admit "other acts" evidence only when relevant to prove the defendant's guilt. *State v. Deivlarco*, 509 N.E.2d 1256 (Ohio 1987). Richey then asserts that Ohio Rule of Evidence 404(b) is identical to Federal Rule of Evidence 404(b) and

that, somehow, this Court should address it under the federal rule standards. As stated above, however, a habeas court's review of admission of evidence issues is limited to whether the evidence was probative or relevant to a material issue in the case. As the Ohio Supreme Court determined, the evidence of threats tends to show a consciousness of guilt. Thus, it was relevant to the state's assertion that defendant was cognitive of the crime he had committed.

Finally, Richey argues that it is unconstitutional for this Court to presume that the three-judge panel excluded improper evidence during its deliberations as this presumption only differentiates capital defendants who choose to have their case tried before a panel from those who opt for a jury trial. This presumption, however, is consistent with Sixth Circuit and Ohio state jurisprudence. *See United States v. McCarthy*, 470 F.2d 222, 224 (6th Cir. 1972)(holding that a judge in a bench trial is presumed to consider only admissible evidence; introduction of incompetent evidence does not require reversal absent an affirmative showing of prejudice); see *also State v. Davis*, 584 N.E.2d 1192 (Ohio 1992)(holding that, in a bench trial, judges are presumed to rely upon only relevant, material, and competent evidence): *State v. Post*, 513 N.E.2d 754 (Ohio 1987)(same). Because none of Richey's attempts to demonstrate the admission of the threat evidence denied him the fundamental right to a fair trial, the court finds Richey's twelfth ground for relief not well-taken.

Ground 15:

In this ground for relief, Richey asserts that a letter Richey wrote to a boyhood friend in Scotland was highly prejudicial yet introduced during the sentencing phase of trial. In this letter Richey wrote:

If one ever pulls a gun on me he'd better shoot to kill.

> * * * Remember that day when I shot Cog's in the head [sic] with your gun, I laughed so hard I almost ripped my sides! [if the police in Scotland] ever found out about ½ the stuff we done they'd bring back the death penalty just for us! * * * If they just give me prison time they better hope to hell I die in there, cause when I get out I won't stop hunting them all down until everyone who is involved in this case is dead!

State v. Richey, 595 N.E.2d at 922. Petitioner explains in his briefs that the "incident" with "Gogs" (Gordon Jack) another boyhood friend involved a BB gun, in which Jack suffered no injury. Because this letter was part of the presentence investigation report, petitioner argues, he was left with the Hobson's choice of either choosing to introduce this damaging letter or limit the mitigation evidence that might be contained within the report. This potential limitation on mitigation evidence, petitioner asserts, denies his right to present any and all mitigation evidence during the penalty phase of trial as mandated by *Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978).

Initially, the Court notes that Respondent asserts this claim is procedurally defaulted because, although raised to the Ohio Supreme Court, that court determined it was waived during trial and addressed it pursuant to a plain error analysis. For reasons stated in Richey's twelfth ground for relief the Court finds this claim is procedurally defaulted.

Moreover, even a review on the merits cannot revive this claim as it represents another of petitioner's attempts to transform a state claim into a federal one. Ohio Revised Code § 2929.03(D)(l) requires that: "When death may be imposed as a penalty, the court, upon the request of the defendant, shall require a pre-sentence investigation to be made and, upon the request of the defendant . . . . [c]opies of any reports prepared under this division shall be furnished to the court, to the trial jury if the offender was tried by a jury, to the

prosecutor, and to the offender or the offender's counsel . . . ." Ohio Rev. Code § 2929.03(D)(l). Thus, the dilemma Richey faced was part and parcel of Ohio law.

Richey cannot cloak himself in federal law to save this claim. The Supreme Court has allowed a wide scope of evidence to be admitted for a judge or jury's consideration during the sentencing phase. In *Gregg v. Georgia*, 428 U.S. 153, 204 (1976), the Court expressly rejected the defendant's contention that the scope of evidence admitted during the sentencing phase was too broad. The *Gregg* Court stated:

> We think that the Georgia court wisely has chosen not to impose unnecessary restrictions on the evidence that can be offered at such a hearing and to approve open and far reaching arguments. So long as the evidence introduced and the arguments made do not prejudice the defendant, it is preferable not to impose restrictions. We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision.

Id.

The Ohio Supreme Court, in its plain error analysis, also noted that the letter is arguably related to the "history, character, and background" of the defendant, which is permissible pursuant to Ohio Revised Code § 2929.04(B). *State v. Richey*, 595 N.E.2d at 922.

Mindful of the restraint a habeas court must exercise when reviewing in admissibility of evidence claim, this Court finds this claim to be without merit. First, this claim is essentially one of state law. Richey's concerns with the requirement to submit the full presentence investigation report to the court and prosecutor must be addressed by an Ohio court. Moreover, he can point to no Supreme Court precedent that supports his contention that he be entitled to

limit the information presented to the panel in his case.[37] Thus, the Court determines that Richey's fifteenth ground for relief is without merit.

Ground 13: The prosecution improperly called as a State witness a defense expert retained by Richey, in violation of the Fifth, Sixth and Fourteenth Amendments.

In his thirteenth ground for relief, Richey alleges constitutional infirmity because the state called Gregory DuBois, a defense-retained expert, as a witness in its case in chief Richey contends that his right to obtain expert assistance arising under *Ake v. Oklahoma*, 470 U.S. 68 (1985) includes the right to obtain confidential assistance. He asserts that to hold otherwise would force an indigent criminal defendant to make a choice between seeking expert assistance or risk revealing to the prosecutor a non-favorable expert report.

Initially, the Court notes that the respondent asserts this claim is procedurally defaulted. While respondent acknowledges that petitioner raised this claim on direct appeal to the Ohio Supreme Court, respondent asserts that the court addressed this claim only under a plain error analysis, thus, it is defaulted. Petitioner disputes this characterization of the Ohio Supreme Court's opinion, contending that it was

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[37] It is noteworthy that one recent Northern District of Ohio court determined that the trial court should have excluded portions of the pre-sentence investigation report. *See Esparza v. Anderson*, No. 3:96CV7434 (N. D. Ohio Oct. 13, 2000). In that case, although the district court determined the trial court committed error by permitting an unredacted copy of the report to reach the jury, it found that fact not to be of constitutional magnitude. *Id.* at 91.

unclear about the way in which the court addressed the claim. A review of the opinion suggests that the Ohio Supreme Court reviewed this claim pursuant to a plain error analysis.[38] As stated above, the Sixth Circuit has determined that a plain error review does not constitute waiver of a state finding of procedural default. Thus, this Court finds this claim to be procedurally defaulted. Richey alleges that he can overcome this default because ineffective assistance of counsel constitutes "cause" to excuse it. Specifically, he alleges that counsel's failure to object to the state's introduction of DuBois constitutes cause to excuse his default. As discussed in ground twenty, however, counsel was not ineffective for failing to object to DuBois' testimony. As Richey can assert neither cause nor does he allege prejudice to overcome the procedural default, the Court bars a merit review of this claim.

Even when addressed on the merits, Petitioner's claim lies on faulty constitutional grounds for several reasons. First, while he asserts that his Fifth, Sixth and Fourteenth Amendment rights were violated, he can point to no law supporting such a proposition. In fact, a paucity of case law exists on this issue. Jurisprudence on this issue focuses on the attorney-client privilege and whether the state violates such privilege by calling a defense expert retained but not testifying for the defense.

The Sixth Circuit has determined that the state may call a defense-retained psychiatrist who was not called at trial without violating the attorney-client privilege. *Noggle v. Marshall*, 706 F.2d 1408 (6th Cir. 1983), *cert. denied*, 464

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[38] Upon deciding the claim on the merits the court noted: "By not objecting, Richey waived any attorney-client privilege as to Dubois. Moreover, no plain error exists; no manifest miscarriage of justice occurred because Dubois's testimony made no difference." *Stale v. Richey*, 595 N.E.2d at 922.

U.S. 1010 (1083). In that case, the court found that Ohio law permitting the prosecution to call a defense-retained psychiatrist on rebuttal did not violate the Sixth Amendment effective assistance of counsel right. Noting that the Ohio courts were attempting to strike a balance between affording a criminal defendant the full scope of the attorney-client privilege and that "[t]he ultimate objective of the trial is truth," which would be hindered by an over extension of the privilege, the Sixth Circuit held that attorney-client privilege is waived when a criminal defendant calls some, but not all defense-retained experts to testify. *Id.* at 1412.

While *Noggle* seemingly would require a determination that petitioner's attorney-client privilege was violated because petitioner did not call any experts prior to the state calling DuBois to testify, the factual distinctions between *Noggle* and the instant case render *Noggle* inapposite. On direct appeal, the Third District Court of Appeals distinguished *Noggle* from Richey's claim:

> We see a clear distinction between the testimony of an expert witness concerning statements made to him by the defendant or defense counsel and the testimony of an expert witness regarding observed facts.
>
> In the instant case, the defense-retained expert was called by the state for the sole purpose of stating his opinion as to the cause of the fire. Mr. DuBois's [sic] opinion was based entirely upon the reports of other witnesses, photographs of the scene of the fire and reports of the State Fire Marshall's Office. DuBois did not testify concerning any statements made to him by the defendant. Nor can it be said that any of his testimony was the result of communications between the defendant and his counsel. Moreover, there is no indication that Mr. DuBois ever consulted with the defendant.

State v. Richey, No. 12-87-2, 1989 WL 156562, at * 29 (Ohio Ct. App. Dec. 28, 1989). Although the Sixth Circuit provides no guidance regarding the distinction between the type of defense-retained expert called during trial, the Fifth Circuit has determined that expert testimony not involving privileged communications between expert and defendant do not violate attorney-client privilege and are not subject to an underlying ineffective assistance of counsel claim. *See United States v. Pipkins*, 528 F.2d 559. 563-64 (5th Cir. 1976)(holding defense-retained handwriting expert called as government witness does not violate attorney-client privilege). Thus, Richey cannot claim that DuBois' testimony violated attorney-client privilege.

Petitioner also makes much of the fact that the *Noggle* opinion noted that the expert was called during rebuttal, not during the state's case in chief, as was the case with Dubois. In *Noggle*, however, the expert was called to ascertain the mental composite of the defendant so that the defense could assert a not guilty by reason of insanity plea. In Ohio, this plea is an affirmative defense that the defendant must raise.[39] Thus, the state in that case had to call the expert only after the defendant raised the issue. In the instant case, however, the state was required to present arson evidence in its case in chief Moreover, Dubois' testimony merely served to confirm the testimony the state proffered through Cryer and Gelfius. Thus, at worst, Dubois' testimony was cumulative.

Finally, Richey relies on *Kordenbiock v. Scroggy*, 919 F.2d 1091 (6th Cir. 1991), *cert denied.* 499 U.S. 970 (1991), for the proposition that he must not only be afforded expert assistance pursuant to *Ake*, but that expert assistance must be kept confidential. *Kordenbrock* does not dictate this outcome. In *Kordenbrock*, the Sixth Circuit determined that an

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[39] *See* Ohio Rev. Code § 2901.02(N) (setting forth burden placed on defendant to prove insanity).

independent state psychiatrist could not satisfy the *Ake* mandate. *Id.* at 1107-08. Nowhere did the *Kordenbrock* court find that experts obtained must be kept confidential. Richey's assertion that his claims even fall under the *Ake* mandate are dubious as that opinion determined only that psychiatric assistance is an integral part of an indigent criminal's effective assistance of counsel. Courts have not extended *Ake* to other experts. *See, e.g., Moore v. Johnson*, 225 F.3d 495, 502 (5th Cir. 2000)(holding petitioner not entitled to state-funded mitigation expert under *Ake); Stephens v. Kemp*, 846 F.2d 642. 645-650 (11th Cir. 1988), *cert. denied*, 488 U.S. 872 (1988), (affirming district court's decision to deny habeas relief even though trial court failed to provide petitioner with ballistics experts); *State v. Patterson*, Case No. 187732, 1986 WL 12850, at *4 (Ohio Ct. App. Nov. 13, 1986)(finding *Ake* does not require trial court to appoint pathology expert). Because Richey offers no applicable law on which to base this claim, the Court finds Richey's thirteenth ground for relief not well-taken.

Ground 14: Prosecutorial misconduct during the trial phase of Richey's trial violated his rights guaranteed by the Sixth, Eighth and Fourteenth Amendments.

In his fourteenth ground for relief, Richey complains that the prosecutor's remarks during closing arguments unduly prejudiced him, thereby depriving him of a fair trial. Specifically, Richey claims that the state unfairly conjectured about how Cynthia Collins must have felt during the last hours of her life. In regards to those hours the prosecutor stated:

> I would like the Court to take a few minutes and go through with me what would have been the last eight hours of life of two-year-old Cynthia Collins. Two-

years old, it's about ten days before her birthday. She would have been three. Upon the board here I put a picture of Cynthia Collins as she appeared that year.

She was playing around the apartment that night. Hope is partying, everybody else is partying. Hope comes and goes, doesn't seem really too concerned, in my opinion, about whether she takes care of Cynthia or not. Other people are left in charge.

Picture in your mind the point of view from Cynthia. Picture, if you can, what her last eight hours were. She is outside playing, all these people are around partying, playing with some friends of hers.

Her mom is not there: her mom is out somewhere else.

And at some point, somebody else puts Cynthia to bed, not her mom, not her dad, somebody puts her to bed.

She goes to bed in the back bedroom and she is sleeping for awhile until she hears some partying going on. She gets up and walks out. And what does she see? She sees Hope Collins and Doug Mull and Bob Nienberg out there smoking hash. She, of course, doesn't really realize what is going on.

She crawls up on somebody's lap and goes over to her

mom and the Defendant is there at some point smoking hash,

too. And she is put back to bed.

The next thing that happened with Cynthia Collins is a fire. If I can use the metaphor, if there is ever a hell in this earth it would be what Cynthia Collins faced at the end of her life: A fire, a raging inferno started by this man knowing that Cynthia was in the back bedroom, knowing she was back there sleeping, having been left in charge, left to babysit by Hope Collins.

Cynthia wakes up in this room that I have aft ached here to the diagram. She wakes up in a smoke-filled room, a room that Keith Hartoon, if you can remember, described as smoked so heavy that when it first came out he said to himself, "I won't go in there, I can't survive."

Cynthia got out of this bed right here. And with the smoke of the raging inferno from the living room probably tried to get out of the room.

Defense Counsel: Objection

The Court: Overruled.

Prosecutor: But the smoke and the heat and the fire and the confusion caused her to die at that point. Think in your mind, if you will, those last few moments of Cynthia Collins' life, getting up, calling for someone perhaps, calling for her mother, calling for her father, calling for anyone, being alone in an apartment with a raging fire caused by this psychopathic killer.

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At that point, Cynthia Collins is down on the carpet face down, dead in her bedroom alone.

(Trial Tr. 1017-1020.) Petitioner also objected to the prosecutor's remarks that petitioner was a "psychopath" both in the above passage and interspersed throughout the closing remarks.

The respondent concedes that this claim was raised

and addressed on the merits to the Ohio Supreme Court on direct appeal as Proposition of Law V. *State v. Richey*, 595 N.E.2d at 924. Accordingly, the Court will address this claim on the merits.

To successfully assert a prosecutorial misconduct claim in a habeas proceeding it "is not enough that the prosecutors' remarks were undesirable or even universally condemned. The relevant question is whether the prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168. 181 (1986)(quoting *Donnelly v. DeChristoforo*, 416 U. S. 637, 642 (1974)). This question must be answered in light of the totality of the circumstances in the case. *Lundy v. Campbell*, 888 F.2d 467, 473 (6th Cir. 1989), *cert. denied*, 495 U.S. 950 (1990). The prosecutor's comments must be so egregious as to render the trial fundamentally unfair. *Fussell v. Morris*, 884 F.2d 579 (6th Cir. 1989)(Table), 1989 WL 100857, at *4 (6th Cir. Sept. 1, 1989).

Recently, the Sixth Circuit reaffirmed its prior jurisprudence on prosecutorial misconduct. *Boyle v. Million*, 201 F.3d 711 (6th Cir. 2000). The court determined that a district court should first determine whether the challenged statements were, in fact, improper, and if so, to determine whether the comments were "flagrant," thus requiring reversal. *Id.* at 717.

> Flagrancy is determined by an examination of four factors: 1) whether the statements tended to mislead the jury or prejudice the defendant; 2) whether the statements were isolated or among a series of improper statements; 3) whether the statements were deliberately or accidentally before the jury; and 4) the total strength of evidence against the accused.

Id. (internal quotation marks and citation omitted).

Although petitioner attempts to liken the prosecutor's closing remarks in his case with that of the *Boyle* petitioner, that analogy must fail. In *Boyle*, the Sixth Circuit determined that prosecutorial misconduct, particularly during closing arguments, was sufficiently prejudicial to grant a writ of habeas corpus. There, the prosecutor, among other things, made several references to the defendant's "privileged" social and economic status as somehow affording the defendant special treatment in the case and other statements that did not originate from the evidence presented during trial. In the instant case, however, the prosecutors remarks, although perhaps excessive in speculation, were not so egregious that they could be classified as "flagrant." The rendition of Cynthia's final moments was fairly brief when taken in context of the entire summation, let alone the evidence presented at trial. The classification of petitioner's mental condition can be likewise categorized as brief and sporadic, rather than excessive. Moreover, given the evidence presented during trial, the statements were not outrageous.

As the Ohio Supreme Court stated:

> The prosecutor did not commit crucial errors. The prosecutor's reference to Richey as a sociopath or psychopath was a fair inference based on the evidence. In any event, it was not prejudicial before a panel of judges. *State v. Post, supra.*
>
> ***
>
> The prosecutor's reference to the helpless victim, who was in a hopeless situation from which she could not escape, was brief and not prejudicial. *See Payne v. Tennessee*, (1991) 501 U.S. 808 . . . . Thus. Proposition of Law V is overruled.

State v. Richey, 595 N.E.2d at 924.

Because the Ohio Supreme Court's review of the facts and applicable law on this issue was not an unreasonable application of federal law, the Court determines that this ground for relief lacks merit.

Ground 16: The three-judge panel's unsupported decision at sentencing completely to ignore Richey's compelling mitigating evidence deprived Richey of rights guaranteed under the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments.

Ground 18: The three-judge panel's failure to consider all mitigating factors during the penalty phase of Richey's trial deprived Richey of his rights under the Fifth, Eighth and Fourteenth Amendments.

Because of the similarity presented in grounds sixteen and eighteen, the Court will consider them simultaneously. In these grounds for relief, Richey alleges the panel on several occasions improperly determined the presence or absence of mitigation. First, Richey contends that the trial court determined, without support from evidence adduced during trial, that Richey had pulled the smoke detector near the Collins apartment from the ceiling, diminishing Cynthia Collins' opportunity to escape the fire unharmed. Respondent does not refute this allegation in the Return of Writ. Additionally, Richey asserts that the three-judge panel ignored a litany of mitigating evidence proffered during the penalty phase. Specifically, Richey maintains the following mitigation evidence was not given due weight during trial:

1) evidence that Richey attempted to return to the Collins apartment in efforts to save Cynthia

2) evidence that Richey suffers from a personality disorder

3) unrefuted evidence that Richey never intended to kill Cynthia

4) it was essentially impossible to kill Candy Barchet and/or Mike Nichols by setting fire in the apartment above Barchet's

5) no accelerants were found on the clothing Richey wore on the night in question

6) the physical evidence upon which traces of accelerants were found was tainted

7) there was no evidence that Richey had actual knowledge that Barchet and/or Nichols were in the downstairs apartment at the time that he allegedly set the fire

8) Richey was intoxicated at the time of the fire

Petition at 43, 45.

Respondent urges the Court to note that portions of this claim are procedurally defaulted and. therefore, should not be addressed on the merits. Respondent submits that while Richey raised most of the above issues on direct appeal as Proposition of Law XVII, he did not raise the issue of his attempts to save Cynthia Collins as a mitigating factor until the *Murnahan* proceeding. This Court agrees. Consequently, as stated in section VI., B., 2., *supra*, the Court finds that portion of Richey's claim to be procedurally defaulted.

In addressing the merits of the claim, Richey relies heavily in his Petition on *Eddings v. Oklahoma*, 455 U.S. 104 (1982) to support the assertion that the trial court

unconstitutionally excluded certain mitigating evidence. As respondent notes, however, the *Eddings* holding merely instructs that the sentencer cannot "refuse to consider, as a matter of law, any relevant mitigating evidence." *Id.* at 114. In that case, the Court inferred by the trial court's language that it had excluded certain evidence regarding the defendant's background because it was legally obligated to do so. In determining the trial court's discarding of mitigating evidence on legal grounds, the Court noted that the evidence the defendant proffered could, "[i]n some cases . . . be given little weight." *Id.* at 115. Thus, the Court did not instruct courts as to how they may appraise the mitigating evidence a defendant proffers, but instead required courts not to exclude evidence because it believed exclusion legally necessary.

Richey's claim that the trial court unconstitutionally excluded mitigating evidence must fail. The panel listed all evidence Richey presented during trial in its Opinion of the Trial Judge in Capital Case. (Respondent Ex. 46.) Although the court stated that it considered all the evidence presented in mitigation, it focused on two statutory mitigating factors: Whether Richey was suffering from a mental disease or defect at the time he committed the offense (Ohio Rev. Code § 2929.04(B)(3) or whether there were any other factors relevant to mitigation (Ohio Rev. Code § 292904.(B)(7).[40] The court determined that there was little evidence to support Richey's claims of mental defect. The court then listed all evidence that Richey presented under the "catch-all"

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[40] Richey also presented evidence of his youth at the time the crime was committed pursuant to Ohio Revised Code § 2929.04(B)(4). He was twenty-one at the time he committed the crimes.

statutory mitigating factor, finding it insufficient to establish that factor. (Respondent Ex. 46 at 2-3.)

Based on the trial court opinion, Richey's claim must fail. Unlike the *Eddings* trial court, the trial court here considered all evidence Richey proffered during mitigation yet determined it deserved little weight. The Court cannot overturn that court's decision absent constitutional infirmity. As stated above, the Sixth Circuit has stated, "'[i]n a federal habeas corpus proceeding such as this one, we do not sit as a "'super' state supreme court" to judge whether the judge erred under state law. Rather, our task is to determine whether the violation rises to the level of a constitutional wrong." *Wilson v. McMacken*, 786 F.2d 216, 221 (6th Cir. 1986). *See also Allen v. Morris*, 845 F.2d 610, 614 (6th Cir. 1988)(holding habeas court must defer to state's own interpretation of state law); *Duff v. Folzz*, 804 F.2d 50, 54 (6th Cir. 1986)(same). Because the trial court's assignment of how much weight it was to give to each mitigating factor is a matter of application of the facts presented to the statutory mitigating factors, this Court cannot now re-weigh those factors to find an outcome according to its liking. This Court is constrained to correct only infractions of constitutional magnitude.

Richey further argues, however, that the trial court erred when it found that Richey intentionally pulled the fire alarm from the ceiling although the state did not introduce evidence that Richey had done so. The respondent does not address this allegation in the Return of Writ. In its sentencing opinion, the trial court listed all evidence presented under the "catch-all" mitigation provision, then, when listing the last provision wrote:

> f) and finally, evidence that the defendant attempted to re-enter the victim's apartment after the fire commenced to rescue the decedent.

> ------this final contention of the defendant was immediately disposed of when placed in juxtaposition to the unrefuted evidence that the defendant pulled the fire alarm from the hall prior to torching the decedent's apartment and effectively eliminated the chance that Cynthia Collins would awaken and escape her own demise.

(Respondent Ex. 46 at 2.) Petitioner alleges that the court's last statement not only served to discount mitigating evidence of his attempts to save Cynthia Collins' life, but the court improperly used the unfounded smoke alarm determination improperly, creating a non-statutory aggravating circumstance.

To the extent that the trial court improperly considered this or any other evidence, any error may be cured by the appellate court's re-weighing of the aggravating circumstances and mitigating factors. In *Clemmons v. Mississippi*, 494 U.S. 738 (1990), the Supreme Court determined that an appellate court's re-weighing of improper aggravating factors can have a curative effect. In that case, the jury found that the state established two statutory aggravating circumstances and sentenced the petitioner to death. *Id.* at 742. The Mississippi Supreme Court later invalidated one of the aggravating circumstances as unconstitutionally vague but upheld the death sentence because the appellate court re-weighed the sentencing decision without the invalidated aggravating factor and found it appropriate. *Id.* at 743. The Supreme Court held that a death sentence could be upheld on appeal even when the jury had considered an invalid or improperly defined aggravating factor. The court determined:

> Nothing in the Sixth Amendment as construed by our prior decisions indicates that a defendant's right to a jury trial would be infringed where an appellate court invalidates one or two or more aggravating

> circumstances found by the jury, but affirms the death sentence after itself finding that one or more valid remaining aggravating factors outweigh the mitigating evidence. Any argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court.

Id. at 745 (citations omitted). The Court remanded the case, however, because is was unclear from the record whether the Mississippi Supreme Court performed the weighing function after it excluded the invalidated aggravating circumstance. *Id.* at 751.

The Court revisited the issue of vague aggravating circumstances in *Stringer v. Black.* 503 U.S. 222 (1992). In *Stringer*, the Court further clarified the state appellate re-weighing process necessary to uphold a death sentence resulting from a constitutionally impermissible aggravating circumstance. First, the Court divided states into "weighing" states or "finding" states. In the first category, a state's capital sentencing process requires the jury to find at least one aggravating circumstance, then weigh that evidence against any mitigating circumstances. *id.* at 229. In "finding" states, however, a jury must find the existence of one aggravating circumstance before considering the death penalty but the aggravating circumstances do not have a specific function in the jury's decision to impose the death penalty. *Id.*

The Court determined appellate review in a "weighing" state would require closer scrutiny than a "finding" state. In those states, the Court opined, for a state appellate court to affirm a death sentence after the sentencer was instructed to consider an invalid factor, the court must determine what the sentencer would have done absent the factor." *Id.* at 230. Moreover, the Court cautioned appellate

courts to subject a death sentence to even closer scrutiny when the trial court utilized a vague or imprecise factor. In those instances, a reviewing court must, ". . . at the very least [conduct a] constitutional harmless-error analysis or re-weighing in the state judicial system." *Id.* at 237.

Because the degree of a reviewing court's scrutiny depends heavily upon the type of state in which a petitioner was convicted, the Court first must determine whether Ohio is a "weighing" state or a "finding" state. A brief review of the Ohio Revised Code reveals it is the former. The Revised Code provides:

> (B) If one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment or count in the indictment and proved beyond a reasonable doubt . . . the court, trial jury, or panel of three judges **shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following [mitigating] factors**

Ohio Rev. Code § 2929.04(B)(emphasis supplied).

After concluding that Ohio is a weighing state, the Court must next ascertain whether the Ohio Supreme Court sufficiently re-weighed the aggravating circumstances on review. The Court determines that it did. In its re-weighing the Ohio Supreme Court determined:

> Richey's background and his personality disorders are relevant under R.C. 2929.04(B)(7), but their impact has already been considered as part of his background and history. No other mitigation appears relevant as "other factors" under R.C. 2929.04(B)(7).
>
> Despite this mitigation evidence, the

> aggravating circumstance outweighs any mitigating factors. In torching an apartment building at night, he jeopardized the lives of others in addition to killing an innocent two-year-old child. Applicable mitigating factors are of little weight when compared to the aggravating circumstance proved against him. His personality disorders did not rise to the level of substantial impairment of capacity under R.C. 2929.04(B)(3). Many criminals have personality disorders. Thus, his background did not contain any substantial mitigating features.

State v. Richey 595 N.E.2d at 931. Of his attempts to rescue Cynthia Collins from the fire, the court stated: "His ostensible efforts to save Cynthia did not help her and interfered with firemen's efforts to rescue her and fight the fire. Under the circumstances, nothing in the facts of the offense is mitigating." *Id.* Because the Ohio Supreme Court's re-weighing process was not an unreasonable application of federal law, this Court finds Richey's sixteenth and eighteenth grounds for relief are not well-taken.

Out of an abundance of caution, the Court will, nevertheless, subject the trial court's finding that Richey unhinged the smoke alarm to a harmless error analysis. The test for determining if harmless error occurred during trial requires a reviewing court to ascertain whether "the error had [a substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993)(quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946))(internal quotation marks omitted); *McGhee v. Yukins*, 229 F.3d 506, 513 (6th Cir. 2000). When a reviewing court is in "grave doubt" or equipoise about whether or not the error is harmless, the court must conclude that the error affected the jury's verdict. *O'Neal v. McAninch*, 513 U.S. 432, 435 (1995).

In this case, any error the trial court admitted by

determining that Richey was responsible for disconnecting the smoke alarm is harmless beyond a reasonable doubt. While Richey may not have been responsible for the smoke alarm's failure, evidence adduced during trial demonstrated that he was aware that Cynthia was sleeping in a back bedroom when he started the fire. Thus, whether he actually disconnected the smoke alarm is of little consequence and would not have swayed the trial court's opinion in finding that Richey had not sufficiently established the "catch-all" mitigating factor.

Additionally, the Court takes issue with Richey's assertion that the trial court, in effect, used the smoke alarm evidence as an impermissible aggravating circumstance. By "juxtaposing" its finding that Richey unhinged the smoke detector with his efforts to rescue Cynthia, the court was merely determining that Richey did not sufficiently establish that his rescue attempts could be categorized as mitigating evidence. Consequently, any error in finding that Richey disconnected the smoke detector was harmless error.

Finally, the court finds that the Ohio Supreme Court's opinion in addressing portions of this claim are not unreasonable applications of federal law pursuant to 2254(d)(1). That court held:.

> In Proposition of Law XVII, Richey complains the trial court erred in not giving any weight to relevant mitigation evidence. In Proposition of Law XIX, Richey argues the court of appeals failed to individually consider his particular character and family background.
>
> Richey presented a variety of evidence concerning his personal history, character and background. Also, several mental health professionals concluded that Richey suffered from borderline and antisocial personality disorders. Richey reasons that this evidence was strongly mitigating and that the

trial court and court of appeals erred by imposing a death sentence.

Contrary to Richey's claims, courts need not give weight to relevant mitigation evidence simply because they must consider such evidence under Supreme Court precedents. *See Eddings v. Oklahoma* (1982), 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed. 1; *Skipper v. South Carolina* (1986), 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1. What weight to be given mitigation evidence is necessarily an individual decision by the fact finder. " * * * The fact that an item of evidence is admissible under R.C. 2929.04(B)(7) does not automatically mean that it must be given any weight." *State v. Steffen*, *supra*, paragraph two of the syllabus. *See*, *also*, *State v. Stumpf* (1987), 32 Ohio St.3d 95, 512 N.E.2d 598. paragraph two of the syllabus.

At times, we have assigned little or no weight to evidence of personality disorders or family background; hence, the trial court did not err when declining to give those factors any weight. *See State v. Cooey*, *supra*, 46 Ohio St.3d at 41. 544 N.E.2d at 919; *State v. Van Hook* (1988), 39 Ohio St.3d 256, 263, 530 N.E.2d 883. 889-890.

State v. Richey, 595 N.E.2d at 929. Because the Ohio Supreme Court's analysis is not contrary to applicable federal law, the Court determines this claim is without merit.

Ground 17: Because the three-judge panel improperly required that Richey's mitigating factors "justify" rather than simply "mitigate," Richey's rights as guaranteed by the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments were violated.

In his seventeenth ground for relief, Richey contends that the three-judge panel unconstitutionally shifted the burden of proof for establishing a mitigating factor when it stated in its sentencing opinion that Richey had to justify his actions for the panel to consider that evidence in relation to the aggravating factor.

In the Imposition of Sentence section of its opinion the panel stated:

> The court, after consideration of the evidence raised at the original trial, the testimony, other evidence, and the arguments of counsel found that the defendant produced no evidence that rose to the level of a mitigating factor. The court finds beyond a reasonable doubt that even if the evidence at the sentencing trial rose to the level of mitigating factors, the aggravating circumstance the defendant was found guilty of outweigh the evidence in mitigation opposed to it.
>
> The panel, therefore, unanimously voted for the imposition of death. Unhappily, the defendant's criminal actions are within what this court feels is recognizable human behavior. The defendant's acts resulting in the death of Cynthia Collins were cold, senseless and savage, **lacking in even a hint of justification**.
>
> The court, therefore, finds beyond a reasonable doubt that the aggravating circumstances outweigh the 'mitigating factors.'

(Respondent ex. 46 at 3)(emphasis supplied). Richey contends that the emboldened language proves the panel required him to produce evidence to justify his crime, rather than merely accept evidence in mitigation of it. Moreover, Richey complains that the Ohio Supreme Court required mitigating evidence to rise to a level of "legal excuse" before

it would find that the evidence constituted a mitigating factor.

Initially, the Court notes that respondent asserts this claim is procedurally defaulted. Richey never raised this claim on direct appeal or at trial. It was raised for the first time during his *Murnahan* application. Richey alleges ineffective assistance of appellate counsel should serve as cause to excuse the default. As he cannot prove that counsel was ineffective, the Court finds this claim to be procedurally defaulted.

In its review on the merits, the Court disputes both the factual and legal allegations in this claim. First, other than Richey's bald assertion and concentration on the word "justification" at the close of the opinion, there simply is no indication that the panel improperly shifted the burden of proof during mitigation. In fact, prior to the section imposing sentence, the court listed all facts that it had accepted into evidence. Thus, although Richey relies heavily on *Eddings v. Oklahoma*, *supra*, that case is easily distinguishable because there, the Court determined the trial court had impermissibly excluded evidence from its consideration. Moreover, when taken in context of the entire section, it is clear that the panel weighed the evidence proffered but found it of insufficient weight to constitute a mitigating factor. Thus, it does not appear the panel assigned a heightened burden of proof to establish any mitigating factors.

Similarly, Richey's contention that the Ohio Supreme Court improperly re-weighed the aggravating and mitigating factors is unfounded. Richey concludes that because the Ohio Supreme Court determined that the mental health evidence adduced during the sentencing phase "did not rise to the level of substantial impairment of capacity," 595 N.E.2d at 930, that the court defined mitigation to include only evidence sufficient to demonstrate legal excuse. Once again, however, Richey misinterprets the court's findings. Rather than saying it would not consider evidence in mitigation unless it rose to a level of legal excuse, the Ohio Supreme Court was merely

articulating that after it considered all evidence adduced in mitigation, it assigned that evidence little weight, insufficient to establish a factor in mitigation. That reweighing of the evidence is precisely the task the Ohio Supreme Court must undertake to cure any trial court weighing defect. *Clemmons v. Mississippi*, 494 U.S. 738 (1990).

Conversely, as Richey himself notes, this Court cannot perform such a review. *Coe v. Bell*, 161 F.3d 320, 334 (6th Cir. 1998), *cert. denied*, 528 U.S. 842 (1999). The only remedy this Court may apply on habeas review to determine the validity of the sentence is to perform a harmless error analysis. *Id.* Although this Court need not perform such an analysis as this claim can be dismissed based on its factual inaccuracy, out of an abundance of caution, it will be undertaken. The test for determining if harmless error occurred during trial requires a reviewing court to ascertain whether "the error had [a] substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993)(quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946))(internal quotation marks omitted); *McGhee* v. *Yukins*, 229 F.3d 506. 513 (6th Cir. 2000). When a reviewing court is in "grave doubt" or equipoise about whether or not the error is harmless, the court must conclude that the error affected the jury's verdict. *O'Neal v. McAninch*, 513 U.S. 432, 435 (1995).

In the instant case, it is clear that any misstatement regarding the "justification" of Richey's acts do not implicate an improper influence on the panel's sentencing determination. When viewed *en total*, it is clear that the trial court considered all evidence in mitigation yet found that it held insufficient weight to give rise to a mitigating factor. Without further evidence than a single use of the word after it made its weighing determination, there is inadequate proof to make a determination that the trial panel used an improper burden of proof to establish a mitigating factor, unduly influencing the sentence thereby. Consequently, this Court

finds that the use of the word "justification," albeit potentially improper, was harmless error. Therefore, Richey's seventeenth ground for relief lacks merit.

> Ground 19: The three-judge panel's failure to consider "residual doubt" as to Richey's guilt as a mitigating factor during the penalty phase of Richey's trial deprived Richey of his rights under the Fifth, Eighth and Fourteenth Amendments.

In this ground for relief, Richey argues that because the panel failed to consider "residual doubt" during the penalty phase, it somehow violated the Constitution, enabling this Court to grant him relief. In his Petition, Richey lists specific factors that the trial court could have, but apparently did not consider in the penalty phase of trial.[41]

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[41] Richey alleges the following factors comprise "residual doubt":

> 1. From 6:27 a.m. on the day of the fire when the police first questioned him through today, Richey has steadfastly and unflinchingly maintained his innocence.
>
> 2. There is insufficient evidence that Richey specifically intended to cause anyone's death.
>
> 3. No accelerants were found on the clothing Richey wore on the night in question.
>
> 4. The physical evidence upon which traces of accelerants were found was tainted.
>
> 5. It was essentially impossible to kill Candy

Barchet and/or Mike Nichols by setting fire in the apartment above Barchet's.

6. If Richey had actually intended to kill Barchet, there was a far simpler way of doing it – after all, her window was wide open at the time of the fire.

7. There was no evidence that Richey had actual knowledge that Barchet and/or Nichols were in the downstairs apartment at the time that he allegedly set the fire.

8. There was unrefuted evidence that Richey never intended to kill Cynthia Collins.

9. Richey attempted to save the life of Cynthia Collins.

10. Richey's alibi explanation as to where he was and what he was doing between 3:40 a.m. and 4:15 a.m. on June 30, 1986 was inherently plausible.

11. There were dramatic inconsistencies and contradictions in the evidence concerning Richey's alleged statement that he was going to burn "A Building" during the evening of June 29/30, 1986.

12. Each of the witnesses who heard Richey say something about burning "A Building" had been drinking heavily prior to the time when they allegedly heard Richey's statement.

13. Juanita Altimus, one of the State's principal witnesses against Richey, was a patently unreliable witness whose testimony was not credible.

Respondent asserts this claim is procedurally defaulted because Richey failed to raise it on direct appeal. Richey acknowledges that he did not raise this claim until he filed his *Murnahan* petition. As stated above, Richey cannot assert ineffective assistance of counsel as cause to excuse procedural default. Thus, this claim is procedurally defaulted.

A merit review of this claim proves unsuccessful as well. To grant a writ of habeas corpus, a petitioner must allege some state court error that offends the federal constitution or laws. 28 U.S.C. § 2241; *Pulley v. Harris*, 465 U.S. 37, 41(1984). Richey, however, asserts no such claim here. Although the Supreme Court has noted that, in a single jury system, doubts about the defendant's guilt created during the guilt phase of the trial may benefit him or her during the penalty phase, the Court placed no constitutional emphasis on these observations. See *Lockhart v. McCrea*, 476 U.S. 162, 181 (1986)(determining that defendant could benefit from residual doubt in a one-jury state criminal system). Petitioner's urging that there was "substantial precedent" at the time of Richey's trial for the panel to consider residual doubt is beside the point. Unless he can assert some federal violation in the panel's exclusion of residual doubt as a mitigating factor, this Court cannot offer him relief. Hence, this Court finds Richey's nineteenth ground for relief is not well-taken.

Ground 20: Richey received ineffective assistance of

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14. There were substantial inconsistencies between the testimony of State Fire Marshall Robert Cryer and Sherry Tice regarding Cryer's initial opinion concerning the cause of the fire.

15. Richey was intoxicated at the time of the fire.

counsel during the guilt phase of his capital trial in violation of the Sixth and Fourteenth Amendments.

In this ground for relief, Riehey alleges twelve principal instances in which trial counsel's errors during the guilt phase of trial were so egregious as to be constitutionally defective.[42] Because respondent alleges procedural default

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[42] In his Petition, Richey alleges that the following actions or inactions by counsel should afford him relief:

1) The actions of an incompetent defense expert prevented counsel from rendering meaningful assistance.
2) Defense counsel failed to conduct an adequate background search for a competent expert, permitting false scientific testimony to go unchallenged during trial.
3) Defense counsel failed to call an expert witness to rebut the testimony of Cryer, Gelfius and DuBois.
4) Counsel failed to object to the introduction of irrelevant and highly prejudicial testimony.
5) Counsel failed to object to the state calling DuBois to testify on its behalf during trial.
6) Counsel disclosed DuBois' name on the witness list he provided the state prior to trial.
7) Counsel failed to object to evidence that petitioner had fought with John Butler prior to June 30, 1986.
8) Counsel failed to object to multiple instances in which the state introduced inadmissable, speculative witness testimony.
9) Counsel failed to make numerous motions.
10) Counsel failed to introduce evidence of the prosecutor's attempt to plea bargain with petitioner before trial.

as to only a portion of these claims, the procedural default analysis will be addressed for each sub-claim individually along with the merits of the claim.

As stated in section VI., B. 2, *supra*, the Sixth Amendment dictates that a criminal conviction must arise from "an adversarial process, rather than the ex parte investigation and determination by the prosecutor." *Nix v. Williams*, 467 U.S. 431, 453 (1984). As such, a criminal defendant is entitled to more than mere appointment of counsel. Counsel's performance during a criminal trial must be sufficient to ensure a defendant's trial was fair. *Strickland v. Washington*, 466 U.S. 668, 685 (1984). To determine whether a criminal defendant received the meaningful representation the Sixth Amendment mandates, a reviewing court must submit counsel's performance to a two-pronged analysis. *Id.* at 687. First, the petitioner must demonstrate that counsel's errors were so egregious that "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* Second, the petitioner must show that he or she was prejudiced by counsel's errors. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.*

To successfully assert an ineffective assistance of counsel claim, a petitioner must point to specific errors in trial counsel's performance. *United States v. Cronic*, 466

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11) Counsel failed to introduce evidence of Peggy Villarreal disclosing Cynthia Collins' prior play with fire and Hope Collins disconnecting the smoke detector in her apartment on the evening of the fire.

12) Counsel failed to insure that he presentence investigation report was accurate and reliable.

Petition at 48-60.

U.S. 648, 666 (1984). Thereafter, a reviewing court must subject the allegations to rigorous scrutiny, determining "whether, in light of all circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Strickland*. 466 U.S. at 690. A reviewing court must strongly presume that counsel's conduct was reasonable and might be part of a trial strategy. *Id.* at 689. When challenging a death sentence, "the question is whether there is a reasonable probability that, absent the errors, the sentencer – including an appellate court, to the extent it independently re-weighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 694. A verdict "only weakly supported" would be more susceptible to influence of counsel error than one which is supported by an overwhelming record. *Id.* at 696. To ascertain whether counsel's performance prejudiced a criminal proceeding, a reviewing court does not speculate whether a different trial strategy might have been more successful, but a court must "focus[]on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993). Mindful of the above requirements, the Court will now address each sub-claim.

A. Defaulted Sub-Claims

Of the twelve sub-claims asserting ineffective assistance of counsel, respondent asserts that ten are procedurally defaulted. Petitioner raised some of these claims for the first time during his petition for post-conviction relief. Petitioner correctly alleges in his Traverse that these claims are not defaulted because they involve facts *dehors* the record. Indeed, in *State v. Coleman*, 707 N.E.2d 476, 483 (Ohio 1999), *cert. denied*, – U.S.–, 120 S.Ct. 379 (1999), the Ohio Supreme Court determined that evidence developed

outside of, or *dehors*, the record cannot be raised initially on direct appeal. Consequently, although respondent asserts sub-claims one, two, three, ten, eleven, and twelve are procedurally defaulted because Richey failed to raise them on direct appeal, the Court determines that because these claims are based on evidence *dehors* the record, they are not defaulted. Those claims will be addressed in section B below. Alternatively, claims six, seven, eight, and nine are procedurally defaulted because they were raised for the first time during the *Murnahan* proceeding although they involved facts based on the record alone.

In sub-claim six, Richey alleges that trial counsel erred when he placed Gregory DuBois' name on the witness list. Although Richey initially implies in his Petition that trial counsel knew DuBois would provide testimony harmful to the defense, he later acknowledges that counsel was unaware of the content of the DuBois report when placing him on the witness list. During his deposition in preparation for this matter, William F. Kluge, lead counsel for Richey during trial, explains that his strategy for placing DuBois' name on the witness list was in response to the state's motion for discovery pursuant to Ohio Rule of Criminal Procedure 16(E)(3). That rule requires defense counsel to list all potential witnesses to be called during trial. As Kluge stated during his recent deposition:

Respondent: Would you explain why you felt you had a duty to provide the State with notice of the witnesses names and addresses in this case?

Counsel: Well, Rule 16 requires us to do so upon request of the State. So we had a list of witnesses which we indicated might be used at trial. And Mr. DuBois, who is on this exhibit was a witness that we intended to call at trial. I don't think we had his report yet at that time

. . . But I'm not real sure.

Respondent: Were you at all worried that if you withheld Mr. DuBois' name and you decided to call him at trial and if you had not given the State notice of his name, that he would not be permitted to testify?

Counsel: Oh, absolutely.

Respondent: So that would have been your reason for, even though you didn't have a report at that time, to at least give notice to preserve your right to call him at trial?

Counsel: Yes.

(Kluge Dep. at 16-17.) Thus, Kluge's decision to list DuBois as a potential witness for trial was a tactical one. Moreover, as respondent notes, Kluge's decision to list DuBois placed him in a risk adverse situation; either DuBois would contradict the state's arson findings, or, at worst, DuBois' testimony would merely be cumulative of the testimony the state already had presented. Counsel's decision to place DuBois on the witness list represents the type of decision *Strickland* meant to shield from constitutional attack. Thus, the Court finds sub-claim six is without merit.

In sub-claim seven, Richey asserts that defense counsel was ineffective for failing to object to the introduction of testimony regarding Richey's reaction to John Butler, a man with whom Candy Barchet had sexual relations during the time she was also seeing petitioner. During trial, the state introduced evidence that when Richey discovered that Barchet and Butler had had relations, he engaged in an altercation with Butler. Richey asserts this is propensity evidence inadmissible under Ohio Rule of Evidence 404(A).

Respondent counters, however, that this evidence helped the state prove a motive for igniting the fire – that Richey became irrationally jealous when discovering Barchet was involved with other men. Because this evidence tended to prove a motive for setting the fire, respondent contends, it falls under the purview of Ohio Rule of Evidence 404(B). The Court determines that counsel's conduct in not objecting to this evidence was not objectively unreasonable as it did, in fact, aid the state in establishing a motive for Richey's arson. Thus, the Court finds this sub-claim not well-taken.

In his eighth sub-claim, Richey asserts that counsel was ineffective for failing to object to various witnesses' testimony regarding their impression of why Richey was upset on the night of the fire. Richey cannot claim that counsel was deficient in failing to object to properly admitted evidence. During the testimony of Robert Dannenberger and Peggy Villarreal, the state elicited testimony as to their observations of why Richey was upset on the evening in question. This evidence was relevant as to Richey's motive to commit the crime and relevant under Ohio Rule of Evidence 401. Thus, counsel was not unreasonable for failing to object to it. Consequently, this sub-claim is without merit.

Finally, in his ninth sub-claim. Richey alleges counsel's ineffectiveness for failing to file a number of trial motions. These motions are:

a. failing to file a motion to dismiss or judgment of acquittal on Count I of the indictment on the ground that transferred intent does not apply to aggravated murder.

b. failure to file a motion to dismiss or judgment of acquittal because the state constructively amended the indictment.

c. failure to file a motion to dismiss or judgment of

acquittal because the three judge panel found that Richey intended to kill Cynthia Collins.

d. failure to file a motion for a new trial after Richey was convicted of specifically intending to kill Cynthia Collins.

e. failure to file a judgment of acquittal for specifically intending to kill Barchet and Nichols.

Because "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies," *Strickland*, 466 U.S. at 697, it is possible to disregard claims based on the fact that they did not prejudice the petitioner. Because all of the above motions were asserted as separate claims elsewhere in this Opinion and found to be without merit (*see* grounds for relief three, four, five, and ten), the Court presumes that counsel's failure to file motions in conjunction with these claims is not prejudicial as it does not undermine the confidence in the outcome of the proceeding. Thus, sub-claim nine is without merit.

B. Non-defaulted Sub-claims

The Court combines sub-claims one, two, and three as all address counsel's decision to hire DuBois and scrutinize his report. As stated above, while respondent asserts these claims are procedurally defaulted, they are based on evidence outside the record and, thus, were properly raised for the first time during post-conviction proceedings. Thus, the Court can address these claims on the merits. Richey asserts that counsel was ineffective for hiring DuBois, for accepting without further question DuBois' results, and for failing to obtain new experts whose reports would have mirrored those of Custer and Armstrong.

Richey relies on *Combs v. Coyle*, 205 F.3d 269 (6th Cir. 2000) for the proposition that failure to conduct an adequate trial investigation constitutes constitutional ineffectiveness. *Combs*, however, is inapposite to the instant case. In *Combs*, defense counsel, alleging an intoxication defense, called an expert witness to testify regarding defendant's psychological ability to form the intent to commit murder. *Id.* at 288. On cross-examination, however, the state asked the expert whether the defendant was so intoxicated on the night of the crime that he could not have formed the intent to commit the crime. The expert responded that was not the ease. Although defense counsel attempted to rehabilitate the expert on re-direct examination, the Sixth Circuit concluded that "this testimony was completely devastating to the defense, and counsel's decision to present it was objectively unreasonable." *Id.*

Conversely, in this case counsel decided not to call DuBois to testify after discussing the content of the report with him. Instead, after learning the contents of DuBois' report, counsel amended his trial strategy to one of questioning whether Richey was, in fact, the arsonist as he had an alibi and the lack of accelerant found on his clothing. Thus, Richey's counsel's behavior was far different than the circumstances presented in *Combs*.

Moreover, counsel's decision to hire DuBois and failure to conduct a search for a new investigator upon receiving DuBois' report does not constitute ineffectiveness. Courts have never instructed that "counsel must continue looking for experts just because the one he has consulted gave an unfavorable opinion." *Sidebottom v. Delo*, 31 F.3d 744, 753 (6th Cir. 1995)(internal quotation marks and citation omitted). It is not incumbent upon counsel after seeking and employing an expert to determine the validity of state evidence to then continue expert-shopping until such a time that counsel can produce a favorable expert. While courts have steadfastly held that the failure to *investigate* can

constitute ineffective assistance of counsel, *see Williams (Terry) v.. Taylor*, – U.S.–, 120 S. Ct. 1495, 1514 (2000)(failure to investigate numerous evidence in mitigation and present it during penalty phase constitutes ineffective assistance of counsel); *Glenn v. Tate*, 71 F.3d 1204, 1207 (6th Cir. 1995), *cert. denied*, 519 U.S. 910 (1996)(same), no court has determined that once counsel undertakes an adequate investigation, any disfavorable results constitutionally require further investigation. Thus, is was not unreasonable for counsel to hire an expert from a known firm who conducted arson investigations or decline from further expert-shopping once that expert rendered his opinion.

Finally, petitioner makes much of the fact that counsel failed to question DuBois' results and, in particular, whether DuBois had done independent research in drawing his conclusions. The Court determines, however, that it is not unreasonable for counsel to rely on expert opinion without questioning the origin of the results. After all, counsel's purpose in hiring an expert is specifically so that he need not make the kind of forensic decisions for which he has hired the expert initially. If counsel were in a position to determine that independent testing of the carpet and wood deck samples was necessary, a fact that DuBois disputes, counsel would likely be in a position to render his own expert testimony. Again, counsel cannot be charged with unreasonable conduct for simply relying on one who holds a degree in a specified area of science, working for a reputable company. To do so would require counsel to go beyond "effective" assistance of counsel to instead render all-inclusive trial assistance; a job for which a law degree does not prepare him. Because counsel's conduct in hiring DuBois and accepting his report was not objectively unreasonable, the Court finds sub-claims one, two and three are not well-taken.

In sub-claim four, Richey contends that his counsel was ineffective for failing to object to evidence that Richey

was a dangerous person and failing to motion the panel to recuse itself after making the finding that Richey's potential danger required him to be shackled. These claims were addressed, *supra* at 69, 72 as grounds for relief eight and nine. Because the Court finds that grounds eight and nine are not meritorious, the Court consequently finds that counsel was not acting unreasonably, nor was Richey prejudiced by counsel's failure to move the panel to recuse itself and the introduction of Richey's potential dangerousness. Furthermore, the Ohio Supreme Court's decision is not contrary to federal law. That court stated: "Richey complains first that his counsel failed to object to evidence about his threats to the prosecutor and witnesses. However, this evidence was arguably admissible and, in any event, made no difference at trial." 595 N.E.2d at 927. As this factual finding in not an unreasonable application of fact, the Court finds this sub-claim lacks merit.

Similarly, in sub-claim five, Richey alleges counsel's constitutional ineffectiveness for failing to object to the prosecution calling DuBois during its case in chief. As the underlying claim was addressed and found to be without merit in ground for relief 13, *supra*, this Court determines that this sub-claim is without merit.

In his tenth sub-claim, Richey alleges counsel's ineffectiveness for failure to introduce evidence that the prosecution offered Richey a plea bargain prior to trial. Richey contends that this evidence, at the very least, should have been raised during the penalty phase of trial to persuade the panel that the death penalty was inappropriate in this ease. As the post-conviction court noted, however, plea offers are considered inadmissible evidence under Ohio Rule of Evidence 410. (Respondent Ex. 73 at 13.) Thus, counsel was not unreasonable for failing to introduce evidence that, pursuant to Ohio evidence law, was inadmissible. Consequently, the Court determines that this sub-claim is without merit.

In Richey's eleventh sub-claim, he argues that counsel was ineffective for failing to utilize the testimony of Peggy Villarreal (a.k.a. Mary Margaret Pingle Villarreal). In testimony provided in an affidavit and in depositions in preparation for this proceeding, Villarreal averred that Cynthia Collins had, on several occasions, been disciplined for playing with matches and starting a fire. Additionally, Villarreal testified that on the night of the fire, Hope Collins had disconnected the smoke alarm so that it would not sound while she attempted to cook dinner.

While this information may have been somewhat valuable to the defense team, it is not as supportive as would appear initially. First, according to her affidavit, Villarreal "thinks" she remembers telling this information to defense counsel but is unsure. (Defendant Ex. 2 to Villarreal Dep. at 3.) Thus, petitioner's factual premise for asserting part of this claim is on uncertain ground. Moreover, even if counsel had known of this information, it may not have been prudent to utilize it. First, the strategy of "blaming the victim" for the fire may have backfired. The panel would have had to find that Cynthia awoke at 4:00 a.m., started a fire in the living room, then returned to her bedroom. This is a dubious scenario. Moreover, although Richey contends that he chose a bench trial to circumvent juror sympathy for Cynthia Collins, utilizing this tactic may have swayed against Richey. There simply is no evidence other than pure conjecture that Cynthia Collins started the fire. Finally, the information that Hope Collins herself disconnected the fire alarm is inconsistent with the position in which the state Fire Marshall found the smoke detector after the fire, i.e., hanging from its wires. Hope's method of disconnecting the alarm to keep it from sounding while cooking was to turn off the breaker or manually fan the air in front of the smoke detector. Thus, this information, if defense counsel was aware of it, may not have aided in Richey's defense. Because there is no sound factual basis on which to assert counsel was made privy to helpful

information before trial yet refused to utilize it, the Court finds counsel's conduct not unreasonable and this sub-claim not well-taken.

Finally, in Richey's twelfth sub-claim, he alleges counsel's ineffectiveness for failure to insure that portions of the pre-sentence investigation report, in particular a letter Richey wrote to a friend in Scotland regarding his shooting of "Gogs," was fully explained. The basis for asserting the ineffectiveness in this sub-claim was addressed *supra* in ground for relief fifteen and found to be without merit. Thus, the Court determines that because it was not prejudicial for the trial court to admit a redacted portion of the letter into evidence in the presentence report, Richey's counsel was not ineffective for failing to object to its introduction. Moreover, the Ohio Supreme Court's analysis of this claim comports with § 2254(d)(l). That court found that counsel's decision not to object to the presentence report "was within the range of professional discretion and cannot be second-guessed on appeal." 595 N.E.2d at 927. Consequently, the Court finds this sub-claim is not well-taken.

Ground 21: Even if each of the individual deficiencies of Richey's trial counsel performance did not render that performance constitutionally ineffective, the aggregate of those individual deficiencies did render trial counsel's performance constitutionally ineffective.

In this ground for relief, Richey contends that even if the Court found none of his individual sub-claims constituted ineffective assistance of counsel that, somehow, when considered in unison, the Court should determine counsel was ineffective. Respondent does not allege this claim is procedurally defaulted, thus, the Court addresses this claim on the merits.

Richey cites no case law that instructs a habeas court

to consider the cumulative effect of ineffective assistance of counsel claims when it finds each individual claim is insufficient. Generally, accumulated errors are not equivalent to reversible error "if the prosecution can prove beyond a reasonable doubt that a constitutional error did not contribute to the verdict." *Satterwhite v. Texas*, 486 U.S. 249, 256 (1988). If error occurred, but without constitutional significance, then the error is deemed harmless and the verdict sound. *Id.* Additionally, circuit courts have held that cumulative ineffective assistance of counsel claims are not cognizable. *See Fisher v. Angelone*, 163 F.3d 835, 852 (4th Cir. 1998), *cert. denied*, 526 U.S. 1035 (1999); *Griffin v. Delo*, 33 F.3d 895, 903-04 (8th Cir. 1994), *cert denied*, 514 U.S. 1119 (1995). Because the foregoing assertions of counsel's ineffectiveness were found to be without merit, the Court determines this claim to be equally non-meritorious.

Ground 22: Richey received ineffective assistance of appellate counsel in violation of the Sixth and Fourteenth Amendments.

The Court previously reviewed this claim in section VI. B. 2 *supra* when determining whether Richey could assert ineffective assistance of appellate counsel to excuse procedural default. In that section, it was determined that Richey could not establish that appellate counsel was objectively unreasonable. That analysis will be repeated here along with the analysis regarding whether Richey can establish that appellate counsel's conduct was prejudicial.

In the twenty-second ground for relief, Richey alleges ineffective assistance of appellate counsel in a two-step fashion: First, Richey contends there are numerous claims counsel failed to raise on direct appeal.[43] Second, Richey

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[43] Specifically, Richey alleges that appellate counsel failed to raise the following nineteen issues:

1) application of transferred intent theory
2) variance between the intent theories in the indictment and evidence presented during trial
3) insufficient evidence to find intent to kill Cynthia Collins
4) difference in intent theories between the indictment and Bill of Particulars
5) insufficient evidence to prove that Richey formed a specific intent to kill Candy Barchet and/or Mike Nichols
6) the verdict was ambiguous and in violation of Richey's right to a unanimous verdict
7) Ohio's statutory definition of "reasonable doubt" falls below the standard required by the Ohio and federal constitutions
8) trial error to require Richey to waive right to jury trial one month before trial
9) state permitted to introduce irrelevant and prejudicial testimony
10) three-judge panel found that Richey pulled smoke detector from ceiling
11) residual doubt
12) three-judge panel required Richey to "justify" rather than "mitigate"
13) Ohio death penalty unconstitutional because it places an increased risk on capital defendants opting for trial
14) prejudice resulting from the introduction of the presentence
investigation report
15) not enough ineffective assistance of counsel issues raised
16) prejudicial portion of letter introduced during trial
17) Ohio applies Ohio Rev. Code § 2929.05 without

asserts that counsel failed to raise these claims because of a conflict of interest arising between trial counsel and the chief of the capital crimes section of the Ohio Public Defender's Commission. Specifically, one of Richey's appellate counsel, Kenneth Murray, contends that his supervisor, David Stebbins. ordered him to remove all ineffective assistance of trial counsel claims because of his friendship with William Kluge, Richey's trial counsel. (Murray Dep. at 50.) As addressed in section VI. B. 2 *supra*, these claims are not procedurally defaulted.

Based on the discovery taken in this proceeding counsel's behavior was not objectively unreasonable. Certainly, if the scenario Murray alleges occurred were authenticated, counsel's behavior would satisfy the first *Strickland* prong. It is undoubtedly unreasonable for a supervisor to order the removal of colorable ineffective assistance of counsel claims merely because of a personal relationship with trial counsel. Richey is unable to prove this fact, however. In the depositions of both Murray and Stebbins, neither affirmatively state that the reason for Stebbins' request was because of his personal relationship with Kluge.

In Murray's deposition, he testified that Stebbins met with him on one occasion to request that he remove all ineffective assistance of counsel claims from his appellate brief. Although Murray indicated that he believed Stebbins' order was based on his friendship with Kluge,[44] Murray also

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adequate safeguards
18) state's failure to record grand jury proceedings
19) Ohio death penalty is facially unconstitutional

[44] During the deposition the following exchange took place:

Petitioner's Counsel: Did you believe when Mr. Stebbins directed you not to

indicated that the stated reason at the time of their meeting was that Stebbins was concerned that these issues would be better supported by evidence outside the record. Therefore, raising them prematurely on direct appeal would bar a post-conviction review. (Murray Dep. at 28.) Similarly, while Stebbins revealed during his deposition that he had no independent recollection of his meeting with Murray on this case, he noted that the issue of when to raise ineffective assistance of counsel claims was, and remains, a difficult one to decipher. (Stebbins Dep. at 50.) Thus, both agree that, at least facially, Stebbins' grounds for ordering the ineffective assistance of counsel claims be removed from the appellate brief are part of a tactical decision that would not run afoul of *Strickland.*

The Court also determines that Richey cannot establish that appellate counsel's behavior prejudiced his appeal. All claims raised in this ground for relief were raised as separate claims elsewhere in Richey's Petition. *See* grounds for relief two, three, four, five. six, seven, nine, ten, fifteen, seventeen, nineteen, twenty, twenty-four, twenty-six, twenty-seven. As the Court finds that those claims lack merit,

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include ineffective assistance of counsel claims in Mr. Richey's direct appeal brief that the reason for Mr. Stebbins' directive was his friendship with Mr. Kluge?

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Murray: Yeah, that's what I thought was happening, that they were friends and he didn't want me to attack Bill in the brief.

(Murray Dep. at 50.)

Richey's ineffective assistance of counsel claims also fail because he cannot establish prejudice resulting from counsel's failure to raise the nineteen claims Richey lists in his Petition. Consequently, because Richey has asserted, and this Court has addressed and rejected all underlying claims for relief asserted in this ground, Richey cannot show that any objectively unreasonable behavior in which appellate counsel may have participated was prejudicial to him. Barring such a showing, the Court finds Richey's twenty-second ground for relief is without merit.

Ground 23: Based upon record evidence, the sentence of death imposed upon Riehey was inappropriate under Ohio law and therefore violates Richey's rights under the Eighth and Fourteenth Amendments.

Richey argues in this ground for relief that, based on the evidence the three-judge panel reviewed in mitigation. the death penalty is an inappropriate sentence for him. Richey points to the circumstantial nature of the evidence, the fact that he attempted to rescue Cynthia Collins, and the fact that the prosecutor offered him a plea bargain prior to trial as mitigating evidence to which the panel did not assign the proper weight. Respondent acknowledges that, other than the plea bargain portion of the claim. Richey raised this claim to the Ohio Supreme Court as Proposition of Law XVIII. Richey does not contest respondent's analysis, thus, the Court considers this claim on the merits, except for the evidence regarding the prosecutor's attempt to plea bargain with Richey prior to trial.

Richey's argument fails as it lacks any issue which a federal habeas court can recognize. "On collateral review, federal courts are not required to re-examine a state court's good faith findings." *Buchanan v. Angelone*, 103 F.3d 344, 351 (4th Cir. 1996), *aff'd*, 522 U.S. 269 (1998). Nor can this

Court sit as a tertiary appellate court once the state appellate and supreme courts have re-weighed the aggravating and mitigating factors and articulated them sufficiently to satisfy the requirements of *Woodson v. North Carolina*, 428 U.S. 280 (1976). In fact, Supreme Court jurisprudence teaches that "the sentencer may be given 'unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty." *Tuilaepa v. California*. 512 U.S. 967, 979-80 (1994)(quoting *Zent v. Stephens*, 462 U.S. 862, 875 (1983)(further citations omitted). Thus, even if this court disagreed with the outcome of the sentencing proceeding, this Court has no authority with which to re-weigh the aggravating and mitigating factors.

Richey further argues that because the trial court found that he pulled the smoke alarm from the ceiling, that the trial court utilized an impermissible, non-statutory aggravating circumstance when sentencing him. The Court addressed this argument in Richey's sixteenth and eighteenth ground for relief, *supra* and, consequently, need not re-address it here. Finally, the Court must defer to the Ohio Supreme Court's appropriateness review unless it is "contrary to, or involved an unreasonable application of, clearly established federal law" or "unreasonable determination of the facts." 28 U.S.C. § 2254(d)(1)-(2). As noted in the above grounds for relief, the Ohio Supreme Court did not make an unreasonable appropriateness review of the aggravating circumstances and mitigating factors in Richey's case, and because Richey asserts no federally cognizable claim, the Court determines his twenty-third ground for relief is not well-taken.

Ground 24: Based upon new evidence, the sentence of death imposed upon Richey is inappropriate under Ohio law and therefore violates Richey's rights under the Eighth and

Fourteenth Amendments.

In his twenty-fourth ground for relief, Richey complains that his death sentence is inappropriate based upon evidence produced during this proceeding. Specifically, Richey points to the deposition of Peggy Villarreal stating that it was Hope Collins who disconnected the smoke alarm on the night of the fire. Alternatively, Richey argues, the smoke alarm may have melted during the heat of the fire, as Custer suggests.

Respondent alleges this claim is both exhausted and procedurally defaulted. The claim is exhausted because Richey has no further remedies available to him pursuant to state law. *Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994). Because he has no state remedy available yet he has never presented this claim to state court, a federal habeas court must deem this claim procedurally defaulted and may address it only upon petitioner's showing of cause and prejudice. *Id.* In response to respondent's assertions, petitioner merely claims that the Ohio Supreme Court considered Richey's appropriateness claim on direct review but fails to explain how the court could have reviewed the evidence Richey presents in this claim that was not before it. Thus, the Court determines that this claim is procedurally defaulted.

Nonetheless, the Court determines that this ground, like ground twenty-three, is not cognizable in this proceeding. In this ground for relief, Richey, in essence, asks this Court to conduct its own appropriateness review but provides the Court no law to support this request. Were this Court to undertake such a task, the evidence Richey presents would not warrant relief given the deference to which a federal habeas court must afford a state court conviction. As stated previously in this Opinion, the evidence produced by discovery in this case does not contradict, but merely undermines evidence presented during trial. Thus, Richey's allegations that the evidence produced during this proceeding

render the death penalty inappropriate in this case are unfounded. As such, the Court determines Richey's twenty-fourth ground for relief lacks merit.

Ground 25: The restricted manner in which Ohio applies its proportionality review violated Richey's due process rights under the Fifth and Fourteenth Amendments, and renders Ohio's capital sentencing system inadequate to safeguard against the arbitrary and capricious imposition of the death penalty.

Ground 26: Ohio's death penalty statute is unconstitutional because its proportionality review statute is arbitrarily and capriciously applied.

In the above grounds for relief. Richey contends that the Ohio Supreme Court improperly applied the Ohio Revised Code § 2929.05, Ohio's proportionality statute in *State v. Steffen*, 509 N.E.2d 383 (Ohio 1987). In that case, Richey alleges, the court limited the comparison of a death-sentenced individual to others who received the death penalty, rather than to those capital defendants who received a life sentence. Additionally, the *Steffen* decision permitted appellate courts to geographically limit the cases for comparison to those within its jurisdiction. Moreover, because the Ohio courts have not prepared reports on every capitally indicted individual, Richey complains that Ohio courts have disregarded the mandate of Ohio Revised Code § 2929.03(F), which requires a trial court to prepare such reports on all capitally charged individuals. Because of this statutory misinterpretation, Richey avers that his own proportionality review was tainted. Citing the dissent in his direct appeal case from the Ohio Supreme Court, Richey notes that he, unlike other death-sentenced defendants.

neither harbored animosity towards the victim, Cynthia Collins, nor did he engage in a face-to-face encounter with the victim. Richey turns to this Court for relief.

Initially, the Court should note that portions of this claim are procedurally defaulted. While Richey did raise the proportionality of the death sentence on direct appeal to the Ohio Supreme Court in Propositions of Law XX and XXI, portions of the claims he raises here were not raised in that court. Specifically, Richey did not raise the restricted pool of cases issue. Thus, respondent contends, it is procedurally defaulted. Richey counter-argues that he did raise this claim during *Murnahan* proceeding and ineffective assistance of appellate counsel establishes cause to excuse the default. As stated above, however, this argument is unpersuasive and the Court determines this portion of the claim is procedurally defaulted.

A review on the merits does not prove fruitful for Richey. As stated above, a proportionality review is not constitutionally required. 465 U.S. 37, 50-51 (1984); *see also McQueen v. Scroggy*, 99 F.3d 1302, 1333-34 (6th Cir. 1996), *cert. denied*, 469 U.S. 893 (1997)("There is no federal constitutional requirement that a state appellate court conduct a comparative proportionality review."). Ohio does, however, provide for an appellate proportionality review. Pursuant to Ohio Revised Code § 2929.05(A):

> In determining whether the sentence of death is appropriate the court of appeals and the supreme court shall consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases. They shall also review all the facts and other evidence to determine if the evidence supports the finding of the aggravating circumstances the trial jury or the panel of three judges found the offender guilty of committing, and shall determine whether the sentencing court properly weighed the aggravating

> circumstances the offender found guilty of committing and the mitigating factors.

Because Ohio law requires appellate courts to provide a proportionality review, its review must be consistent with constitutional requirements. *See, e.g., Kordenbuock v. Scroggy*, 680 F. Supp. 867, 899 (ED. Ky. 1988)(citing *Evitts v. Lucey*, 469 U.S. 387 (1985)). Although a district court must determine whether such review is constitutionally effectuated, that review, nevertheless, is a limited one. The district court is to examine the state's proportionality review *only* to determine whether the imposition of the death penalty is patently unjust or "'shocks the conscience'; the Court is not to second-guess the state court's comparison of other cases in which the death penalty was imposed." *Id.* (citing *Moore v. Balkcom*, 716 F.2d 1511, 1517(11th Cir. 1983), *cert. denied*, 465 U.S. 1084 (1984)).

In the instant case, the Ohio Supreme Court articulated its proportionality analysis so as not to deny Richey a meaningful proportionality review. Upon reviewing all proffered mitigating evidence that court stated:

> Despite this mitigation evidence, the aggravating circumstance outweighs any mitigating factors. In torching an apartment building at night, he jeopardized the lives of others in addition to killing an innocent two-year-old. Applicable mitigating factors are of little weight when compared to the aggravating circumstance proved against him. His personality disorders did not rise to the level of substantial impairment of capacity under R.C. 2929.04(B)(3). Many criminals have personality disorders. Thus, his background did not contain any substantial mitigating features.
>
> The death penalty is appropriate and proportionate when compared with similar felony murder cases. *See*

> *State v. Bonnell* (1991), 62 Ohio St.3d 179, 573 N.E.2d 1082 (felony murder); *State v. Lott*, *supra* (felony murder, victim set on fire); *State v. Seiber*, (1990), 56 Ohio St.3d 4, 564 N.E.2d 408 (felony murder); *State v. Powell*, (1990), 49 Ohio St.3d 255, 552 N.E.2d 191 (felony murder, seven-year-old victim); *State v. DePew*, *supra* (felony murder including arson, three victims including seven-year-old); *State v. Morales*, (1987)32 Ohio St.3d 252, 513 N.E.2d 267 (felony murder, twelve-year-old victim); *State v. Buell*, (1986) 22 Ohio St.3d 124,22 OBR 203, 489 N.E.2d 795 (felony murder, eleven-year-old victim); *State v. Maurer*, *supra* (felony murder, seven-year-old victim).

595 N.E.2d 915, 931 (Ohio 1992).

The Ohio Supreme Court's analysis satisfied its obligation under Ohio Revised Code § 2929.05(A) and the United States Constitution. *See Lindsey v. Smith*, 820 F.2d 1137, 1154 (11th Cir. 1987), *cert. denied*, 489 U.S. 1059 (1989)(holding that state appellate courts need not "make an explicit, detailed account of their comparisons" because, "based on their own past experience in reviewing capital punishment cases, state appellate courts 'can rationally distinguish between those individuals for whom the death penalty is an appropriate sanction and those for whom it is not")(quoting *Spazicino v. Florida*, 468 U.S. 447 (1984)). Even if the Court were to agree that the *Richey* dissent correctly identified several circumstances that would determine the death penalty inappropriate,[45] the verdict does

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[45] In his dissent, Justice Brown noted, in addition to the fact that Richey harbored no animosity towards Cynthia Collins, that "[s]everal cases are cited by the majority to show the proportionality of the death penalty in this case. However, if one reads those cases (which are merely listed and not

not "shock the conscience" as is required for this Court to find the verdict unconstitutional.

Richey makes a last attempt to successfully assert a proportionality claim by alleging that the proportionality review statute creates a liberty interest. Petition at 176 n.55. Citing *Coe v. Bell*, 161 F.3d 320 (6th Cir. 1998), in which the Sixth Circuit determined the Tennessee proportionality statutes did not create a liberty interest because they set up procedures that put specific limits on official discretion, Richey underscores the fact that the Ohio proportionality statute does direct the courts how to undertake a proportionality review and defines the terms of proportionality by requiring courts to set up a database of cases. As respondent notes, however, the Sixth Circuit recently reviewed the Ohio proportionality statute and determined that it does not create a liberty interest. *Byrd v. Collins*, 209 F.3d 486, 539 (6th Cir. 2000). Accordingly, the Court determines claims twenty-five and twenty-six are not well-taken.

Ground 27: Richey's rights under the Fifth, Eighth, and Fourteenth Amendments were violated because other aspects of Ohio's death penalty statute are unconstitutional on their face and as applied to Richey.

In the twenty-seventh ground for relief, Richey alleges that the Ohio death penalty scheme is fraught with constitutional infirmity. Richey claims eight provisions of the Ohio statutes infringe on his constitutional rights. These sub-claims are:

1) the Ohio statutes do not require the state to prove

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analyzed by the majority), it is obvious that not one remotely resembles this one." 595 N.E.2d at 933.

the defendant had the conscious desire to kill

2) the Ohio statutes fail to require proof beyond *all* doubt to convict

3) the Ohio statutes do not require the state to prove the absence of mitigating factors and that the death penalty is the only appropriate remedy

4) the Ohio statutes require the state to prove specifications of aggravating circumstances during the guilt phase of a capital trial

5) capital defendants who exercise their right to a jury trial are at greater risk to receive the death penalty than those who make plea agreements

6) the pre-sentence investigation report, once ordered by the defendant, is submitted to the prosecution and the trial court

7) Ohio courts perform a cursory appropriateness review of death sentences

8) the Ohio statutes deprive the sentencer of the option to choose life imprisonment in instances where it finds the aggravating circumstances outweigh the mitigating factors

Of these eight sub-claims, respondent alleges that three of them, sub-claims (5), (6), and (7) are procedurally defaulted because Richey did not raise these arguments until his application to re-open his direct appeal. As noted in section VI., B., 2., above, Richey cannot establish cause to excuse his procedural default. Thus, the Court determines sub-claims (5), (6), and (7) are procedurally defaulted.

Regardless of their defaulted status, the Court also determines that they lack merit. In sub-claim (5), petitioner contends that the Ohio death penalty statutes impose a greater risk of death on those capital defendants who choose to exercise their right to trial. In *United States v. Jackson*, 390 U.S. 570, 582 (1968), the Supreme Court determined that a legislative body cannot produce a chilling effect on a defendant's Fifth Amendment right not to plead guilty and Sixth Amendment right to trial. In that case, the Court struck down the capital portions of a federal kidnaping statute because it authorized only the jury to impose the death sentence. Conversely, in Ohio "a sentence of death is possible whether a defendant pleads to the offense or is found guilty after trial." *State v. Buell*, 489 N.E.2d 795 (Ohio 1986). Consequently, the Ohio scheme comports with the constitutional mandate.

In sub-claim (6), petitioner alleges it unconstitutional that the pre-sentence investigation report, once ordered by the defendant, must be disclosed to the prosecution and trial court. In *State v. Williams*, 490 N.E.2d 906, 913 (Ohio 1986), the Ohio Supreme Court cogently analyzed this claim based on federal precedent:

> The United States Supreme Court has held that confrontational rights do not apply to all types of hearings. *Wolff v. McDonnell* (1974), 418 U.S. 539. All that due process requires with respect to post-conviction reports is giving the defendant the chance to rebut any alleged inaccuracies. *See Gregg v. Georgia* (1976), 428 U.S. 153, 189 fn.37; *United States v. Papajohn* (C.A.8. 1983), 701 F.3d 760, 763; and *Farrow v. United Stales*, (C.A.9, 1978), 580 F.2d 1339, 1360.

Because Richey was afforded due process during the mitigation phase, there is no merit to this claim.

In sub-claim (7) Richey alleges that the appellate courts provide a cursory appropriateness review. The Court addressed the appropriateness review in ground for relief twenty-four and found the Ohio courts perform this review in a constitutionally permissible manner. The Court need not re-address that argument here.

Of the claims that Richey raised before the Ohio Supreme Court, none possess merit. In sub-claim (1), Richey takes issue with the fact that Ohio Revised Code § 2903.01(B) permits a court to convict a defendant of murder without first proving the defendant possessed a conscious desire to kill. The Supreme Court has sanctioned the use of a criminal state of mind less culpable than intent, i.e.. reckless indifference, as an acceptable level of culpability to impose the death penalty. *See Tison v Arizona*, 481 U.S. 137, 156 (1986)(affirming death sentence of capital defendant who took part in prison escape but was not present when murder of kidnaped family occurred).

Richey's second sub-claim, that the Ohio scheme fails to require the state to convict only after providing proof beyond *all* doubt stands on faulty constitutional ground. *In re Winship*, 397 U.S. 358. 364 (1970) explicitly stated that the standard required to convict a criminal defendant is "proof beyond a reasonable doubt."

Richey's third argument was specifically rejected in *Walton v. Arizona*, 497 U.S. 639, 649-50 (1990). In that case the Court held that a death penalty scheme requiring the defendant to establish mitigating factors by a preponderance of evidence is constitutionally acceptable burden shifting. Moreover, Richey's assertion that the state must prove that the death penalty is the only appropriate remedy also is misplaced. No such constitutional mandate exists. Finally, the Ohio scheme provides for an appropriateness review on direct appeal. *See* ground for relief twenty-four, *supra.*

In sub-claim (4), Richey argues that the Ohio statutes require the state to prove specifications of aggravating

circumstances during the guilt phase of a capital trial. The Ohio death penalty comports with Supreme Court jurisprudence that requires a state statutory scheme to limit the class of death-eligible defendants. Moreover, use of the aggravating circumstances proved during the guilt phase was upheld in *Lowenfeld v. Phelps*, 484 U.S. 231, 246 (1987); *see also Walton v. Arizona*, 497 U.S. 639 (1990)(specifically upholding this type of system).

Finally, in sub-claim (8) Richey claims that the Ohio death penalty scheme is unconstitutional because it fails to provide the sentencing authority the option to impose a life sentence after finding that the aggravating circumstances outweigh the mitigating factors. The Supreme Court rejected the identical argument in *Blystone v. Pennsylvania*, 494 U.S. 299 (1990). Because none of Richey's sub-claims successfully allege the Ohio death penalty scheme's unconstitutionality, the Court finds this ground for relief is not well-taken.

Ground 28: The State violated Richey's rights as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments when it failed to disclose material exculpatory evidence.

Richey alleges in the twenty-eighth ground for relief that the prosecutor withheld exculpatory information from him during trial in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Essentially, Richey claims that discovery in this proceeding uncovered two facts that were exculpatory and within the state's control. First, Richey claims the Putnam County Sheriff's Department had in their file handwritten notes that "some of the tenants turned off smoke alarms because they were sensitive to cigarette smoke." Steve Stechschulte seemingly confirmed this statement during depositions taken in this proceeding when he affirmatively responded to the question that his investigation led him to

information that tenants in the Old Farm Village Apartments often disconnected their smoke detectors because they were sensitive. (Stechschulte Dep. at 138-39.) Second, Richey contends that the prosecution withheld information it obtained from Peggy Villarreal Price that on the night of June 29, 1986, Hope Collins had disconnected the smoke detector while cooking dinner. Both these facts, Richey argues, would have altered the outcome of the guilt and sentence phases of trial particularly because the trial court focused on its finding that Richey pulled the smoke detector from the ceiling when it determined Richey did not establish any mitigating evidence.

Respondent asserts that this claim is procedurally defaulted. Richey initially raised this claim in his recent second-post conviction relief petition. The trial court declined to hear the petition on its merits, noting that Richey could not overcome the hurdle set forth in Ohio Revised Code § 2953.23. That statute states:

> (A) . . . a court many not entertain a petition flied after the expiration of the period prescribed in division (A) of that section or a second petition or successive petitions for similar relief on behalf of a petitioner unless both of the following apply:
> (1) Either of the following applies:
> (a) The petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief
> (b) Subsequent to the period prescribed in division (A)(2) of section 2953.21 of the Revised Code or to the filing of an earlier petition, the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation, and the petition asserts a

> claim based on that right.
> (2) The petitioner shows by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted, or, if the claim challenges a sentence of death, but for constitutional error at the sentencing hearing, no reasonable factfinder would have found the petitioner eligible for the death sentence.

Subjecting this claim to the four-prong *Maupin* test, the Court finds this claim procedurally defaulted. First, the Ohio court articulated a procedural rule that is applicable and with which Richey failed to comply. Second, this statute is actually enforced and represents an adequate and independent state ground as it is similar to the *res judicata* principle articulated in *State v. Perry* but applied in a successor post-conviction review context. Because Richey cannot establish cause and prejudice to excuse his non-compliance with the rule,[46] the Court determine this claim is procedurally defaulted.

Nevertheless, the Court will review the claim on its merits. To establish a claim under *Brady v. Maryland*, 373 U.S. 83 (1963), "the petitioner has the burden of establishing that the prosecutor suppressed evidence; that such evidence was favorable to the defense; and that the suppressed evidence was material." *See Carter v. Bell*, 218 F.3d 581, 601 (6th Cir. 2000)(citing *Moore v. Illinois*, 408 U.S. 786,

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[46] Richey cannot allege ineffective assistance of counsel as cause to excuse the default here because there is no constitutional right to effective assistance of counsel on collateral review. *Coleman v. Thompson*, 501 U.S. 722, 751-53 (1991).

794-95 (1972)). "The inquiry is objective. independent of the intent of the prosecutors." *Id.* (citing *Brady*, 373 U.S. at 87.)

"[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome" of the proceeding. *United States v. Bagley.* 473 U.S. 667, 676 (1985). There is no *Brady* violation "Where a defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory information, or where the evidence is available . . . from another source, because in such cases there is really nothing for the government to disclose." *Coe v. Bell*, 161 F.3d 320, 344 (6th Cir. 1998), *cert. denied*, – U.S. – , 120 S. Ct. 110 (1999)(citation and internal quotation marks omitted).

Recently, the Supreme Court expounded on the prejudice or "reasonable probability" prong of *Brady.* In *Strickler v. Greene*, 527 U.S. 263, 296 (1999), the Court found that, although the prosecutor had violated the first two prongs of *Brady* by failing to provide exculpatory information to the defense, the petitioner did not sufficiently demonstrate that "there [was] a reasonable probability that his conviction or sentence would have been different had these materials been disclosed." In that case, the principal witness positively identified the petitioner during trial. In fact, she provided specifics of the petitioner's abduction of the victim and how she was able to remember such detail. *Id.* at 272. Upon obtaining the interviewing detective's handwritten notes from initial interviews with the witness, however, her credibility was undercut significantly. The Court determined that, even if the witness's testimony had been impeached entirely, there was ample other evidence to convict, and, thus, provide the Court with sufficient assurance that the wrongfully excluded evidence would not have upset the trial's outcome. *Id.* at 296. Mindful of this

law, the Court now addresses Richey's alleged *Brady* material.

Richey's claim fails two of the three *Brady* prongs. While the evidence may be characterized as favorable to the defense, this information was not within the exclusive control of the prosecution and therefore was not "suppressed" pursuant to *Brady*. The Court notes that in his first petition for post-conviction relief and in the Petition pending before this Court, Richey has argued that his trial counsel was ineffective for failing to utilize information Peggy Villarreal Price provided to counsel about Hope Collins disconnecting the smoke detector on the night of the fire. Consequently, his current assertion, that the prosecution withheld this information from the defense appears dubious.

Even if the Court were to disregard Richey's wavering assertion regarding Villarreal's disclosure to trial counsel, Richey cannot support his *Brady* claim. The fact that some tenants may have told police investigators that tenants disconnect their smoke alarms was not information exclusively within the state's control, indeed, the fact that Richey lived in the apartment complex and spent much time in the company of "A" Building residents would make him more aware of their practices than a police investigation might reveal. Moreover, this information is not material. Even if Richey had introduced evidence of practices of other residents, this information could hardly be relevant to who pulled the smoke detector from its wires during the fire. Had the prosecution withheld information specifically relating to how the smoke detector was found hanging from its wires, Richey's *Brady* claims might have stood on solid ground. Because this "exculpatory" information merely recites the general practices of those living in the complex, however, it is irrelevant to the state's assertion of how the smoke detector became disconnected. Because this information does not "undermine the confidence in the outcome" of the trial, the Court determines that the state's failure to produce this

evidence was not a *Brady* violation.

Similarly, the evidence that Hope Collins disconnected the smoke detector on the night of the fire, although relevant, cannot surpass the *Brady* test. First, as with the above evidence, this evidence, derived from Peggy Villarreal Price was not exclusively within the state's control. In fact, as noted above, defense counsel interviewed Price after the fire. Richey also cannot demonstrate that this information was material and would have altered the outcome of his trial. As in *Strickler*, there is ample additional evidence from which the trial court could determine that Richey set the fire that killed Cynthia Collins. Evidence of his prior statements that "A Building would burn," that he had access to accelerants and that those same accelerants were utilized to ignite the fire was sufficient for a trial court to find that Richey was its instigator.

Richey next argues that the information that it was Hope Collins, and not he, who disconnected the smoke detector was material as to whether he received the death sentence is more persuasive but ultimately must fail. Hope Collins testified that although she did often disconnect this smoke detector, she performed this task by one of two means. She either would flip off the switch on the fuse box or would fan the smoke away from the detector. In cases where she would manually fan the smoke, she often would unhook the cover of the smoke detector and let it swing from the hinges. She further testified that she at no point unscrewed the smoke detector, allowing it to dangle from its wires. Thus, had Richey presented evidence of Hope's prior practice of disarming the smoke detector, this information would not have deterred the panel from finding Richey had pulled it from the ceiling. Furthermore, even if the panel had not inferred that Richey disconnected the smoke detector, there was direct evidence that Richey knew Cynthia was asleep in a back bedroom when he started the fire. This evidence alone is sufficient to determine that Richey placed Cynthia in

harm's way, thus, his efforts to rescue her were not sufficient to mitigate his crime. Because there is ample evidence from which the panel could impose the death penalty on Richey excluding the smoke detector evidence, the Court determines that Richey cannot establish a *Brady* claim based on this information.

As Richey does not carry the burden of demonstrating that the prosecutor withheld exculpatory, material evidence that prejudiced the outcome of the proceeding pursuant to *Brady*, the Court determines that this claim is without merit.

VIII. Conclusion

For the foregoing reasons, the Petition is denied. The Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could be taken in good faith as to grounds 1, 9, 10, 16, 18, 22, 23 and 24 and the Court hereby issues a certificate of appealability pursuant to 28 U.S.C. § 2253(c) and Fed.R.App.P. 22(b) as to those grounds only. As to all remaining grounds, the Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith, and that there is no basis upon which to issue a certificate of appealability. 28 U.S.C. § 2253(c); Fed.R.App.P. 22(b).

IT IS SO ORDERED.

/s/ PATRICIA A. GAUGHAN
United States District Judge

APPENDIX D

NOT RECOMMENDED FOR PUBLICATION

No. 01-3477

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KENNETH T. RICHEY	)	
	)	
Petitioner-Appellant,	)	
v.	)	ON APPEAL FROM THE
	)	UNITED STATES
BETTY MITCHELL, Warden)		DISTRICT COURT FOR
	)	THE NORTHERN
Respondent -Appellee.)		DISTRICT OF OHIO
	)	

BEFORE: SILER, DAUGHTREY, and COLE, Circuit Judges.

R. GUY COLE, JR., Circuit Judge. Kenneth Richey appeals the district court's denial of his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. In 1987, Richey was found guilty of the aggravated felony murder of Cynthia Collins and sentenced to death. In his habeas petition, Richey contends, *inter alia,* that there was insufficient evidence to support his conviction because there was no evidence that he intended to cause the death of the actual victim. Because we are uncertain as to how Ohio defined the intent element of aggravated felony murder at the time of the offense, we respectfully certify a question to the Ohio Supreme Court before addressing Richey's constitutional claims.

BACKGROUND

In January 1987, a three-judge panel convicted Richey of aggravated felony murder, aggravated arson, breaking and entering, and child endangerment. Following a sentencing hearing, Richey was sentenced to death in February 1987. Richey timely appealed his conviction and sentence, and the Ohio Court of Appeals affirmed the conviction, *see State v. Richey,* No. 12-87-2, 1989 WL 156562 (Ohio Ct. App. Dec. 28, 1989), and death sentence. *See State v. Richey,* No. 12- 87-2, 1989 WL 156561 (Ohio Ct. App. Dec. 28, 1989). In August 1992, a divided Ohio Supreme Court affirmed the conviction and sentence. *See State v. Richey,* 595 N.E.2d 915 (Ohio 1992). That court subsequently denied Richey's application for rehearing, *see State v. Richey,* 598 N.E.2d 1172 (Ohio 1992), and the United States Supreme Court denied his petition for a writ of certiorari. *See Richey v. Ohio,* 507 U.S. 989 (1993).

Represented by new counsel, Richey filed an untimely application for reconsideration pursuant to Ohio Rule of Appellate Procedure 26(B). Richey's new counsel claimed that his prior appellate counsel's ineffectiveness established good cause for the untimely filing. The appellate court identified the untimely filing as a "fatal procedural defect," found that Richey could not establish good cause, and denied the application. *State v. Richey,* No. 12-87-2 (Ohio Ct. App. Jan. 4, 1995). Richey then appealed to the Ohio Supreme Court, which affirmed the denial of Richey's application for the reasons stated by the court of appeals and, in part, because it found Richey had no constitutional right to counsel in his application for reconsideration. *See State v. Richey,* 653 N.E.2d 344 (Ohio 1995).[47]

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[47] We have previously rejected this alternate argument, holding that because the application for reconsideration is part of the direct appeal process. Petitioners are

Thereafter, Richey initiated state post-conviction proceedings. The Court of Common Pleas denied his petition, *see Findings of Fact, Conclusions of Law, Entry Denying Petition to Vacate or Set Aside Sentence without a Hearing,* No. CR 86-21, May 12, 1997; the court of appeals affirmed that decision, *see State v. Richey*, No. 12-97-7, 1997 WL 722782 (Ohio CL App. Nov. 18, 1997); and the Ohio Supreme Court declined review. *See State v. Richey*, 690 N.E.2d 1287 (Ohio1998). Richey next filed a second state post-conviction petition, which the trial court denied as an unauthorized second or successive petition. *See* O.R.C. 2953.23(A). The court of appeals affirmed that decision, *see State v. Richey*, No. 12-2000-03, 2000 WL 681642 (Ohio Ct. App. May 26, 2000), and the Ohio Supreme Court again declined jurisdiction. *See State v. Richey,* 736 N.E.2d 25 (Ohio Oct. 4, 2000).

Richey then filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 in the Northern District of Ohio in June 1998. The petition set forth 28 grounds for relief, including the 11 that are the subject of this appeal. We now consider only one issue raised by Richey: whether there was sufficient evidence to prove the level of intent required by the aggravated felony murder statute.

The facts necessary to consider this single issue are relatively straightforward. On June 30, 1986, a fire broke out in a second-floor apartment, killing Cynthia Collins. In the apartment directly below the Collinses' apartment, Candy Barchet, Richey's ex-girlfriend, and Mike Nichols, Barchet's new boyfriend, were sleeping. At trial, the prosecution introduced evidence showing that Richey felt possessive toward Barchet and was upset by Barchet's relationship with other men, including Nichols. The prosecution's theory was

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constitutionally entitled to the assistance of counsel in applying for reconsideration. *See White v. Schotten,* 201 F.3d 743, 752 (6th Cir. 2000)

that Richey set the fire in an attempt to harm Barchet and/or Nichols. As conceded by the state, there was no evidence that Richey intended to cause the death of Collins.

DISCUSSION

1. Procedural Posture

Richey concedes that his sufficiency claim has been procedurally defaulted but argues that we should nevertheless consider it, as well as his contention that his trial counsel and appellate counsel were ineffective for failing to present the issue to the state courts. Moreover, he argues that we should consider the claim that his appellate counsel was ineffective in failing to argue that his trial counsel was ineffective for not raising the issue.

Generally, we cannot reach the merits of a claim that has been defaulted in state court based on an independent and adequate state procedural ground. *See Coleman v. Thompson,* 501 U.S. 722, 750 (1991). One exception to this general rule is those cases in which a petitioner is able to establish *both* cause for failing to raise the claim in the state courts *and* resulting prejudice. See id. Ineffective assistance of counsel, to the extent the ineffectiveness claim is not itself procedurally defaulted, can establish cause. *See Edwards v. Carpenter,* 529 U.S. 446, 453 (2000). To determine whether counsel was ineffective, we must determine (1) whether counsel's performance was deficient and (2) whether the petitioner was prejudiced by counsel's performance. *See Strickland v. Washington,* 466 U.S. 668, 687 (1984). In this instance, as explained below, we are uncertain about the elements of the offense and seek guidance from the Ohio Supreme Court in evaluating Richey's claim of insufficient evidence. By virtue of this uncertainty, we are also uncertain as to whether Richey can establish the prejudice necessary to a successful ineffective assistance of counsel claim. Without

knowing whether Richey was prejudiced by his counsel's failure to raise the claim, we cannot know whether he is able to establish "cause." Likewise, we are unable to determine whether Richey is able to demonstrate the "prejudice" required under the second prong of the cause and prejudice test.

In the necessarily circular route we take to assess our ability to consider procedurally defaulted claims, we must first evaluate the merits of the claim and then determine whether we can reach the merits of the claim. Therefore, our question about the intent element implicates not only the merits of the claim, but the procedural posture as well.

2. Intent Requirement

It is well established that "the Fourteenth Amendment forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt." *Fiore v. White*, 531 U.S. 225, 228-29 (2001) (citing *Jackson v. Virginia,* 443 U.S. 307,316 (1979); *In re Winship*, 397 U.S. 358, 364 (1970)).

Richey was convicted of aggravated felony murder in violation of Ohio Revised Code § 2903.01.[48] At the time of the fire, the statute provided,

> (B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit . . . aggravated arson or arson . . . .

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[48] The statute was modified in 1996. Here, we are only concerned with the statute as it existed at the time of the offense.

* * *

> (D) No person shall be convicted of aggravated murder unless he is specifically found to have intended to cause the death of another . . . . If a jury in an aggravated murder case is instructed that a person who commits or attempts to commit any offense listed in division (B) of this section may be inferred . . . to have intended to cause the death of any person who is killed during the commission of, attempt to commit, or flight from the commission of or attempt to commit the offense, the jury also shall be instructed that the inference is nonconclusive, that the inference may be considered in determining intent, that it is to consider all evidence introduced by the prosecution to indicate the person's intent and by the person to indicate his lack of intent in determining whether the person *specifically intended to cause the death of the person killed,* and that the prosecution must prove the specific intent of the person to have caused the death by proof beyond a reasonable doubt.

O.R.C. § 2903.01 (emphasis added).

Richey focuses on the italicized language to support his claim that subsection (D) was elemental and prohibited reliance on transferred intent to obtain an aggravated felony murder conviction. If the doctrine transferred intent is inapplicable, evidence of Richey's intent to cause the death of Barchet and/or Nichols is irrelevant. According to Richey's argument, the state was required to prove that he intended to cause the death of the person killed. But, the state concedes that there is no evidence that Richey intended to cause the death of Collins. Hence, Richey contends the state failed to prove a necessary element of aggravated felony murder.

In assessing a claim of insufficient evidence brought pursuant to § 2254, a reviewing federal court must identify the required elements by looking to the definition of the offense under state law. *See Gall v. Parker,* 231 F.3d 265, 287 (6th Cir. 2000). Specifically, we are admonished to "defer to state courts' construction of . . . state laws in making such determinations." *Id.* Accordingly, in our attempt to identify the intent requirement, we turn to the relevant decisions of the Ohio Supreme Court.

In *State v. Sowell,* 530 N.E.2d 1294 (Ohio 1988), the Ohio Supreme Court appeared to acknowledge that subsection (D) eliminated the use of transferred intent in cases of aggravated felony murder. In that case, the court considered Sowell's appeal from a conviction for aggravated murder under O.R.C. § 2903.01(A).[49] The conviction stemmed from an incident in which Sowell killed a bystander in a failed attempt to kill another person. Sowell contended that his conviction could not stand because subsection (D) precluded the prosecution's reliance on transferred intent. *See id.* at 1305. The Ohio Supreme Court rejected this argument, but provided the following explanation:

> Subsection (D) of O.R.C. 2903.01 deals specifically with subsection (B) of that statute, which defines the offense known as "felony murder." It does not affect O.R.C. 2903.01(A), which is involved in the case at bar, or our holding in *State* v. *Solomon,* [421 N.E.2d 139 (Ohio 1981)]. The doctrine of transferred intent is firmly rooted in Ohio law. See *Wareharn v. State* [25 Ohio St. 601 (Ohio 1874)]. Our decision in *State v. Solomon* remains good law and we reiterate our

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[49] Subsection (A) provides, "No person shall purposely, and with prior calculation and design, cause the death of another."

> holding that if one purposely causes the death of another and the death is the result of a scheme designed to implement the calculated decision to kill someone other than the victim, the offender is guilty of aggravated murder in violation of O.R.C. 2903.01(A).

Id.

In explaining why Sowell's argument failed, the Ohio Supreme Court strongly implied that subsection (D) was elemental and eliminated the doctrine of transferred intent from subsection (B). Our understanding of this opinion is based on two factors. First, the court relied on the distinction between subsection (A) and subsection (B) to reject Sowell's claim. In other words, the court appeared to accept the argument that subsection (D) was elemental, but limited its reach, consistent with the language of the statute, to subsection (B). Second, the court limited application of the doctrine of transferred intent to those cases in which "the death is the result of a scheme designed to implement the calculated decision to kill." *Id.* This language explicitly refers to cases of aggravated murder, but not to cases of aggravated felony murder. Although the outcome of Sowell's case turned on the applicability of the transferred intent argument to subsection (A), the Ohio Supreme Court seemed to recognize that transferred intent could not be used to secure an aggravated felony murder conviction.

Weighing against this reading of the statute is the fact that the Ohio Supreme Court did not endorse or apply it in its opinion affirming Richey's conviction and sentence on direct appeal. *See State v. Richey, 595* N.E.2d 915 (Ohio 1992). However, the court's failure to address the statutory question may well have resulted from defense counsel's failure to

present this precise claim,[50] although the court did recognize that transferred intent was implicated in the case against Richey:

> The evidence also established Richey's intention to kill Candy and Nichols. The fact that the intended victims escaped harm, and that an innocent child, Cynthia Collins, was killed instead, does not alter Richey's legal and moral responsibility. "The doctrine of transferred intent is firmly rooted in Ohio law." *State v. Sowell,* [530 N.E.2d 1294, 1305 (Ohio 1988)]. Very simply, "the culpability of a scheme designed to implement the calculated decision to kill is not altered by the fact that the scheme is directed at someone other than the actual victim." *State v. Solomon,* [421 N.E.2d 139, 142 (Ohio 1981)].

595 N.E.2d 915, 925 (Ohio 1992). Thus, the court set out – as a general principle – the doctrine of transferred intent, but it did not address the impact (or lack thereof) of subsection (D) on the elements of aggravated felony murder in Richey's particular case. Accordingly, we are uncertain as to whether the Ohio Supreme Court was passing judgment on the present argument or was simply making a *sua sponte* observation about the doctrine of transferred intent.

We further hesitate to attribute to the Ohio Supreme Court an interpretation of the statute that eliminates the doctrine of transferred intent as applied to Richey's case because such an interpretation might implicate the Due Process Clause. Although we normally defer completely to a state court's interpretation of its own law, "due process bars courts from applying a novel construction of a criminal

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[50]Although an insufficient evidence claim was raised, it addressed nothing more than the wholly circumstantial nature of the evidence.

statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *United States v. Lanier*, 520 U.S. 259, 266 (1997). Put simply, "a criminal statute must give fair warning of the conduct that it makes a crime." *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964). And the due process concerns over unforseen interpretations of a criminal statute are at their zenith when, as in this case, "the claim is that a statute precise on its face has been unforeseeably and retroactively expanded by judicial construction." *Id.* at 352.

Because at the time of Richey's conduct, the text of the statute and its treatment by the Ohio courts, appeared to eliminate the possibility that transferred intent could be used as a basis for a conviction under the Ohio aggravated felony murder statute, an interpretation to the contrary might raise serious concerns under the Due Process Clause. *See, e.g., Rabe v. Washington*, 405 U.S. 313, 316 (1972) (reversing as violative of Due Process Clause a state law conviction that rested on unforeseeable judicial interpretation of a criminal statute); *Bottle*, 378 U.S. at 350 (same); *see also Gall v. Parker*, 231 F.3d 265,305-06 (6th Cir. 2001) (granting writ of habeas corpus upon holding that elimination of element of a crime by state supreme court violated Due Process Clause when both the plain text of the statute and prior state court decisions instructed otherwise). First, the statute requires that the jury evaluate "whether the person specifically intended to cause the death *of the person killed.*" O.R.C. § 2903.01(D) (emphasis added). This language seems unambiguously to require that the defendant specifically have intended to cause the death of the person that actually died – a requirement contrary to the doctrine of transferred intent. Moreover, as we noted above, the Ohio Supreme Court strongly suggested in *Sowell* that the transferred intent doctrine did not apply to aggravated felony murder charges, and such an interpretation proved essential to its ultimate holding in that case. *See Sowell*, 530 N.E.2d at 1305. The Ohio Supreme Court's

reading of the statute to preclude the use of transferred intent was further confirmed by the Ohio Court of Appeals in *State v. Mullins*, 602 N.E.2d 769, 771 (Ohio Ct. App. 1992), in which the court noted that the doctrine of transferred intent "has apparently been removed by the legislature from application in aggravated murder cases."

In short, at the time of Richey's conduct, it appeared clear as a matter of Ohio law that his conduct could not be the basis for a conviction under the aggravated felony murder statute: an interpretation to the contrary would likely be "at odds with the statute's plain language and ha[ve] no support in prior [state court] decisions." *Rogers v. Tennessee*, 532 U.S. 451, 458 (2001). Because we do not lightly assume that the Ohio Supreme Court interpreted the statute in a way that would raise such serious concerns under the Due Process Clause, we certify to the Ohio Supreme Court the question whether transferred intent can support a conviction under the aggravated felony murder statute. Further, we stay Richey's execution until we have issued our final judgment.

ORDER CERTIFYING QUESTION TO THE SUPREME COURT OF OHIO

Because we are unable to discern the intent requirement of aggravated felony murder from the Ohio Supreme Court's construction of the statute, we respectfully certify the following question:

> As provided by O.R.C. § 2903.01 in June 1986, is intent to cause the death of someone other than the actual victim sufficient to establish the requisite intent for aggravated felony murder?

Pursuant to Ohio Supreme Court Practice Rule XVIII, we provide the following required information:

(A) CAPTION OF THE CASE: *Richey v. Mitchell,* NO-01-3477.

(B) STATEMENT OF FACTS/QUESTION TO BE ANSWERED: The nature of the case, the circumstances from which the question arises, and the question to be answered have been explained *supra.*

(C) NAMES OF EACH PARTY: Kenneth Richey (Appellant) and Betty Mitchell, Warden (Respondent).

(D) COUNSEL FOR EACH ARTY:

(1) For Petitioner-Appellant Richey: Paul E. Nesmer and Kenneth J. Parsigian, Goodwin Procter LLP, 53 State Street, Exchange Place, Boston, MA 02109-2881, telephone (617)570-1000.

(2) For Respondent-Appellee Mitchell: Michael J. Collyer, Assistant Attorney General, Capital Crimes Section, 615 W. Superior Aye, 11th Floor, Cleveland, OH 44113, telephone (216)787-3030.

(E) MOVING PARTY: Kenneth Richey.

Accordingly, the clerk of this court is directed to serve copies of the certification order upon all parties or their counsel of record and file with the Ohio Supreme Court the certification order under seal, along with proof of service.

/s/ R. Guy Cole, Jr.
R. Guy Cole, Jr.
United States Circuit Judge

SILER, Circuit Judge, dissenting. Neither party has asked this court to certify any questions to the Ohio Supreme Court. This is just another delay in reaching the merits of the habeas corpus petition. I do not deny that we may certify a case to the state supreme court in an appropriate case, *see Stewart v. Smith,* 534 U.S. 157, 159-60 (2001), but this practice should be effected very sparingly in habeas corpus cases when a state supreme court has already exhaustively reviewed the case.

An example of such a mistake in certifying a case to a state supreme court is found in *House v. Bell,* 311 F.3d 767(6th Cir. *2002)(en banc).* There, we certified questions to the Tennessee Supreme Court. Approximately one year later, the Tennessee Supreme Court declined to answer the certified questions, so the case has returned to our court on the same issues as before. See *House v. Bell,* M2003-01 952-SC-523-CQ, 2003 Tenn. LEXIS 1155 (Tenn. Dec. 1,2003).

Likewise, in the ease at bar, I can see no reason for the Ohio Supreme Court to respond to our question. As the majority opinion correctly states, on direct appeal that court already decided the certified issue. As that court stated then:

> The evidence also established Richey's intention to kill Candy and Nichols. Before the fire, Richey threatened Candy and any new boyfriend she would acquire. At the party, Richey specifically threatened to burn Building "A." He then set the fire in a jealous rage directed at Candy and her new boyfriend. The fact that the intended victims escaped harm, and that an innocent child, Cynthia Collins, was killed instead, does not alter Richey's legal and moral responsibility. "The doctrine of transferred intent is firm rooted in Ohio law." *State v. Sowell* (1988), 39 Ohio St. 3d 322, 332, 530 N.E. 2d 1294, 1305 . . . . In this case, substantial evidence existed to sustain all the

elements of the offenses charged, and the panel's verdict stands.

The Ohio Supreme Court discussed the *Sowell* case and had the issue before it, regardless of whether it was raised by Richey. The issue was decided as a matter of state law, and now we are certifying it back to the same court that discussed it more than ten years ago in this case. Richey has cited no Ohio Supreme Court decisions since 1992 that bring this doctrine into question.

Without expressing my opinion on all of the issues which Richey raises before our court, I am of the firm opinion that the Ohio Supreme Court has already spoken on the issue to be certified, and that we should proceed to resolve the other issues before us. Therefore, I respectfully dissent on certifying this question to the Ohio Supreme Court.

PROOF OF SERVICE

True copies of the foregoing Certification Order were sent this 2nd day of April, 2004, by ordinary United States Mail, to Paul E. Nesmer and Kenneth J. Parsigian, Goodwin Procter LLP, 53 State Street, Exchange Place, Boston, Massachusetts 02109-2881, counsel for petitioner-appellant; Michael J. Collyer, Assistant Attorney General, Capital Crimes Section, 615 W. Superior Avenue, 11th Floor, Cleveland, Ohio 44113, counsel for respondent-appellee.

/s/ Leonard Green
Leonard Green, Clerk

(Seal)

APPENDIX E

Richey v. Mitchell.

2004-0572.

SUPREME COURT OF OHIO

102 Ohio St. 3d 1468; 809 N.E.2d 1156

June 9, 2004, Decided

Moyer, C.J., Resnick, F.E. Sweeney, Pfeifer, Lundberg Stratton and O'Connor, JJ., concur. O'Donnell, J., dissents.

MERIT DECISION WITHOUT OPINION

On review of preliminary memoranda, motion for admission pro hac vice of Paul E. Nemser by Georgia Elizabeth Yanchar, motion for admission pro hac vice of Daryl L. Wiesen by Georgia Elizabeth Yanchar, and motion for admission pro hac vice of Kenneth J. Parsigian by Georgia Elizabeth Yanchar. The court declines to answer the certified questions. This cause is therefore dismissed.

Moyer, C.J., Resnick, F.E. Sweeney, Pfeifer, Lundberg Stratton and O'Connor, JJ., concur.

O'Donnell, J., dissents.

The motions for admission pro hac vice are granted.

APPENDIX F

THE STATE OF OHIO,
APPELLEE,

v.

RICHEY,
APPELLANT.

No. 90-338

SUPREME COURT OF OHIO

64 Ohio St. 3d 353; 595 N.E.2d 915

March 17, 1992, Submitted
August 12, 1992, Decided

APPEAL from the Court of Appeals for Putnam County, No. 12-87-2.

Around 4:15 a.m., on June 30, 1986, in Columbus Grove, Ohio, a raging fire broke out in Hope Collins's second-floor apartment, killing Cynthia Collins, Hope's two-year-old daughter. Less than an hour before, Hope had left her apartment after Kenneth T. Richey, defendant-appellant, agreed to baby-sit Cynthia. Circumstantial evidence established that while in Hope's apartment, Richey had spread gasoline and paint thinner around the apartment and ignited it.

Richey, Hope, Peggy Price, Candy Barchet, Richey's ex-girlfriend, and a variety of other witnesses to these events

lived at the Old Farm Village Apartments in Columbus Grove. Peggy and Hope lived in adjacent second-floor apartments, and Candy lived directly below Hope. All three apartments were in Building or Section "A" at Old Farm Village. Candy and her infant son moved into their apartment around June 15, and she met Richey. Within a few days, Candy and Richey formed a sexual relationship, and Richey frequently told Candy he loved her and "would kill any other guys" she was with.

On June 24, Richey learned that Candy had just been in bed with John Butler, and Richey pulled a knife on Butler. In response, Butler "bounced him around the room a little bit." Just after that fracas, Richey broke his hand by punching a door, requiring a splint.

On Sunday evening, June 29, Candy took her new boyfriend, Mike Nichols, to a party in Peggy's apartment; during the party, Candy kissed Nichols openly and told Richey that she wanted to date Nichols. Richey became upset at this news. When Candy went home, around 1:00 a.m., she asked Nichols to spend the night with her, which he did.

That night, Richey wore his Marine Corps camouflage fatigues and combat boots, and he still had his right hand bandaged in a splint. Some witnesses reported Richey was intoxicated. Jeffrey Kezar recalled Richey saying, "If I can't have her [Candy], nobody else can."

Richey told several persons that Building "A" would burn that night and he would use his Marine training to do that. Robert Dannenberger described Richey as "very upset" and said Richey threatened to blow the place up since he had "learned how to do explosives" in the Marines. Peggy Price became upset, and Richey told her, "Well, instead of blowing it up, I'll torch A Section." Price recalled that Richey said,

"Before the night is over, part of A Building is going to burn down." Shirley Baker also recalls Richey saying, "A Building was going to burn * * *." Juanita Altimus, while just outside her own apartment, overheard Richey say on the landing, "Building A was going to burn tonight."

By 2:00 a.m., the party was breaking up, and Richey kept asking Hope if he could spend the night on her sofa. Hope refused. Around 2:20 a.m., June 30, Richey offered to steal some flowers for Peggy from a greenhouse across the street, but Peggy told Richey not to bring them to her.

Between 3:00 and 3:30 a.m., Dennis Smith drove up and asked Hope to go with him. Hope replied she did not have a baby-sitter, but Richey said, "Well, I'll keep an eye on her [Cynthia], if you'll let me sleep on your couch." A neighbor also overheard Hope say to Richey, "Go upstairs with Scootie [Cynthia's nickname] -- she's asleep -- but don't lock the door because I can't get back in because I don't have a key."

Around 4:15 a.m., neighbors reported bright orange flames and smoke coming out of the Collins apartment, and the fire department responded. Firemen saw several feet of flames from the apartment and deck curl up over the roof. A resident and a fireman both started into the apartment, but the heat and fire were too intense. A fireman then went back in, with oxygen, but he could not find Cynthia and soon ran out of oxygen.

Ultimately, several firemen, with fire hoses and oxygen masks, succeeded in removing Cynthia's body from her burning bedroom. Cynthia died from asphyxia related to smoke inhalation.

When the firemen arrived, Richey was either at the Collins apartment or he arrived shortly thereafter; he was screaming that a child was still inside. One fireman saw him coming out of the apartment, helped him up, and had to restrain him to keep him from going back in. Richey was combative, argumentative, and interfered with efforts to fight the fire and rescue Cynthia. Two deputy sheriffs overpowered Richey and turned him over to Police Chief Thomas Miller to keep him out of the way.

During the fire, Richey asked Nichols, "Why don't we finish it now, since you think you're so bad[?]" Richey also asked Candy if the fire had scared her. When she replied it had, Richey told her, "if he couldn't have me, that nobody would * * *." Altimus reported that Richey, as he looked over the fire damage, drank a beer, laughed, and said, "It looks like I did a helluva good job, don't it."

Richey admitted that he had earlier gotten two plants from the K & J Greenhouse for Candy, and police found those plants outside Candy's apartment. The K & J owner identified them as having been stolen from his greenhouse. Richey had also offered to steal two plants for Peggy that evening. The K & J owner confirmed that paint thinner and gasoline were kept in two unlocked storage sheds. Gasoline and paint thinner could have been stolen from these sheds; the owner did not know if any was missing.

Assistant State Fire Marshal Robert Cryer concluded from the physical evidence and burn patterns that an accelerant had been used. An accelerant had been poured on the apartment's wooden deck, the fire's point of origin, as well as the living room rug. A smoke detector had been pulled from the ceiling before the fire. The fire was a very fast, hot, intense fire because of the accelerant.

Gregory DuBois, a consulting engineer, agreed that the fire had been caused by arson and that accelerants had been used. One rug sample from the Collins apartment contained gasoline, and another rug sample revealed paint thinner. Wood chips from that apartment's deck also contained paint thinner. However, laboratory tests failed to reveal any accelerants on Richey's fatigues or boots.

Chief Miller interviewed Richey as a witness on the morning of June 30 and also obtained his statement in the afternoon after advising him of his rights. By July 1, the investigation had focused on Richey, and police arrested Richey for arson and took further statements after advising him of his rights. Police tape-recorded an interview of Richey on July 1. Fire Marshal Cryer and Assistant Prosecuting Attorney Randy Bassinger participated in that interview.

In these statements, Richey maintained that he had been drunk on June 30 and did not remember much. However, he denied starting the fire or knowing how it started. He also denied that Hope had asked him to baby-sit Cynthia, and claimed that he had been at his father's apartment when the fire began. Richey did admit that he knew Cynthia was in Hope's apartment; he had stopped and looked in on her while she was sleeping during the party. Richey also claimed that he had secret ways with witnesses so they would not testify against him. In a later statement, he said he would cut the prosecutor's throat.

A grand jury indicted Richey for aggravated murder with a specification alleging murder in the course of arson, aggravated arson, breaking and entering (the greenhouse), involuntary manslaughter, and child endangering. A panel of three judges convicted Richey of all charges, save the manslaughter charge, which was dropped. Following a presentence investigation, mental evaluation, and mitigation

hearing, the panel sentenced Richey to death for aggravated murder and consecutive prison terms for the other offenses. The court of appeals affirmed the convictions and sentence.

Daniel R. Gerschutz, Prosecuting Attorney, for appellee.

Randall M. Dana, Ohio Public Defender, *Jane P. Perry* and *Kevin L. Fahey*, for appellant.

Moyer, C.J. We have reviewed appellant's twenty-three propositions of law, independently assessed the evidence relating to the death sentence, balanced the aggravating circumstance against the mitigating factors, and compared the sentence to those imposed in similar cases. As a result, we affirm the convictions and sentence of death.

I

Evidence of Threats

In his first proposition of law, Richey argues that admitting evidence of his threats destroyed the constitutionally required reliability and fairness of his trial and sentence. This evidence included the following. Richey told Deputy Roy Sargent on November 19 that "Randy Bassinger [the prosecutor] was a dead man" and that "whoever testified against him had better hope he's six feet under." On August 17, Richey told Deputy Mike Ball to take a message to Randy Bassinger, "that when he got out he was going to cut his throat."

While in pretrial confinement, Richey initiated conversations with his jailers about the offenses charged against him. Richey's threats were simply part of those conversations. Although Richey moved to suppress these statements, he did not object specifically to evidence of the threats. Hence, the issue is waived except for plain error.

State v. Williams (1977), 51 Ohio St.2d 112, 5 O.O.3d 98, 364 N.E.2d 1364; *State v. Long* (1978), 53 Ohio St.2d 91, 7 O.O.3d 178, 372 N.E.2d 804.

Richey's threats reflect a consciousness of his guilt, similar to evidence of flight to avoid prosecution, or efforts made to cover up a crime or intimidate witnesses. See *State v. Eaton* (1969), 19 Ohio St.2d 145, 48 O.O.2d 188, 249 N.E.2d 897 (flight from justice may indicate a consciousness of guilt); *Cleveland v. McNea* (1952), 158 Ohio St. 138, 142, 48 O.O. 68, 70, 107 N.E.2d 201, 203 (suppression of adverse evidence constitutes a prejudicial circumstance of much weight); *State v. Huffman* (1912), 86 Ohio St. 229, 99 N.E. 295; *Moore v. State* (1853), 2 Ohio St. 500; 2 McCormick on Evidence (4 Ed.1992), Sections 263, 265; 2 Wigmore on Evidence (Chadbourn Rev.1979 and 1991 Supp.), Sections 273, 276 and 278.

However, even if we were to find the evidence improper, no plain error is apparent. The circumstantial evidence against Richey was compelling in view of his explicit threat that Building "A" would burn that night, his motive and opportunity to start the fire, and the other circumstances. In *State v. Bayless* (1976), 48 Ohio St.2d 73, 106, 2 O.O.3d 249, 267, 357 N.E.2d 1035, 1056, vacated in part (1978), 438 U.S. 911, 98 S.Ct. 3135, 57 L.Ed.2d 1155, we found evidence about threats against deputies to be harmless error even though wrongfully admitted, over objection, in an aggravated murder prosecution. Additionally, in a bench trial, the court must be presumed to have "'considered only the relevant, material, and competent evidence in arriving at its judgment unless it affirmatively appears to the contrary.'" *State v. Post* (1987), 32 Ohio St.3d 380, 384, 513 N.E.2d 754, 759.

In Proposition of Law II, Richey argues that the judges of the panel, having been persuaded at the trial's outset that Richey was dangerous, should have disqualified themselves.

At the trial, the prosecutor moved that Richey's hands and feet be shackled. However, the panel ordered Richey's feet shackled but left his hands free.

Admittedly, "no one should be tried while shackled, absent unusual circumstances." *State v. Kidder* (1987), 32 Ohio St.3d 279, 285, 513 N.E.2d 311, 318. However, shackling is left to the trial court's sound discretion. *State v. Woodards* (1966), 6 Ohio St.2d 14, 23, 35 O.O.2d 8, 13, 215 N.E.2d 568, 576. In this case, defense counsel did not object to the shackling, and Richey had repeatedly threatened to kill the prosecutor and witnesses against him. Under the circumstances, we find no prejudicial error. Compare *Woodards v. Cardwell* (C.A.6, 1970), 430 F.2d 978, with *Kennedy v. Cardwell* (C.A.6, 1973), 487 F.2d 101; Annotation (1979 and 1991 Supp.), 90 A.L.R.3d 17. On its own motion, the court ruled that deputies could wear firearms and could search anyone entering the courtroom, but those orders reflected routine housekeeping functions. See R.C. 2945.03.

Even though the judges had been exposed to evidence about Richey's threats, they did not need to recuse themselves. Richey accepted the panel and raised this issue neither at trial nor before the court of appeals. Hence, we need not consider this issue. *State v. Williams, supra; State v. Price* (1979), 60 Ohio St.2d 136, 14 O.O.3d 379, 398 N.E.2d 772.

State v. Gillard (1988), 40 Ohio St.3d 226, 533 N.E.2d 272, is distinguishable. *Gillard* involved a ruling on *ex parte* evidence in a closed hearing under Crim.R. 16(B)(1)(e). Also, *Gillard* did not announce a *per se* prejudice rule. In this case, as in *Gillard*, the trial judges are presumed not to have improperly used the evidence about threats in their subsequent deliberations. *State v. Post, supra*. Nothing in the

record indicates they did so, and the evidence of guilt is otherwise compelling. See discussion, Part V.

Since the evidence about Richey's threats was included in the report of the presentence investigation, it could be considered during sentence deliberations. Such evidence relates to an accused's "history, character, and background." R.C. 2929.04(B). Criminal wrongdoing, even without convictions, is part of an accused's social history and thus properly included in a presentence investigation report. *State v. Cooey* (1989), 46 Ohio St.3d 20, 35, 544 N.E.2d 895, 914; *State v. Hutton* (1990), 53 Ohio St.3d 36, 559 N.E.2d 432, paragraph one of the syllabus.

II

Presentence Investigation

In Proposition of Law III, Richey argues that the presentence investigation report ("PSI") erroneously included a letter he wrote. The trial court had earlier suppressed that letter as not relevant at the guilt or penalty phase.

While in pretrial custody, Richey wrote to a friend in Scotland that police in the United States did not scare him. The letter was quoted in the PSI as follows:

"If one ever pulls a gun on me he'd better shoot to kill. * * * Remember that day when I shot Gog's in the head with your gun, I laughed so hard I almost ripped my sides! [If the police in Scotland] ever found out about 1/2 the stuff we done they'd bring back the death penalty just for us! * * * If they just give me prison time they better hope to hell I die in there, cause when I get out I won't stop hunting them all down until everyone who is involved in this case is dead!"

Arguably that letter was relevant to the sentencing decision. A PSI is not limited by the strict rules of evidence. See *State v. Greer* (1988), 39 Ohio St.3d 236, 254, 530 N.E.2d 382, 402-403. This PSI related to Richey's "history,

character, and background." R.C. 2929.04(B); *State v. Hutton, supra.*

Moreover, having failed to object to the PSI, or the letter's inclusion in the PSI, Richey waived any issue related to the PSI except for plain error. *State v. Cooey, supra*, 46 Ohio St.3d at 35, 544 N.E.2d at 914; *State v. Long, supra*. No plain error was involved since the court already knew Richey had threatened the prosecutor and the trial witnesses. See Part I. Hence, evidence of these additional threats made little difference and did not cause a miscarriage of justice.

III

Other Evidence Issues

In his fourth proposition of law, Richey argues that his rights to a fair trial and effective counsel were violated when the prosecutor called a defense retained expert as a state witness. Dubois, a consulting engineer, agreed with the State Fire Marshal's opinion that accelerants had been used in the fire.

The right to the effective assistance of counsel includes access to defense experts, and the state's use of such witnesses could infringe an accused's attorney-client privilege. See *Miller v. Dist. Ct. of Denver* (Colo.1987), 737 P.2d 834; *State v. Mingo* (1978), 77 N.J. 576, 392 A.2d 590; but, see, *Noggle v. Marshall* (C.A.6, 1983), 706 F.2d 1408; *Granviel v. Estelle* (C.A.5, 1981), 655 F.2d 673; *State v. Pawlyk* (1990), 115 Wash.2d 457, 800 P.2d 338.

The prosecutor's use of a defense expert does not violate an accused's Sixth Amendment right to counsel. *Noggle, supra*. Although the prosecutor's use of a defense expert may violate an accused's attorney-client privilege, Dubois did not disclose or rely upon any confidential communications here. Instead, Dubois based his testimony upon the physical evidence, reports, and photographs of the fire.

By not objecting, Richey waived any attorney-client privilege as to Dubois. Moreover, no plain error exists; no manifest miscarriage of justice occurred because Dubois's testimony made no difference. The Fire Marshal's testimony that the fire had been caused by arson and accelerants was not otherwise contradicted. In such cases, the record must reflect prejudice before reversal is required. See *Hutchinson v. People* (Colo.1987), 742 P.2d 875, 886; *United States v. Talley* (C.A.9, 1986), 790 F.2d 1468; *State v. Mingo*, 77 N.J. at 588, 392 A.2d at 596.

In Proposition of Law VI, Richey argues that the admission of the Collins carpet into evidence violated his rights because the physical integrity of the carpet had been compromised. Two deputy sheriffs recovered the Collins carpet from a trash dump on July 1, where it had been taken, unknown to investigators, after the fire. Two samples from this carpet revealed the presence of gasoline and paint thinner.

The evidence firmly established that the carpet admitted into evidence was the carpet from the Collins apartment. Authentication "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Evid.R. 901(A). The possibility of contamination goes to the weight of the evidence, not its admissibility. "A strict chain of custody is not always required in order for physical evidence to be admissible." *State v. Wilkins* (1980), 64 Ohio St.2d 382, 389, 18 O.O.3d 528, 532, 415 N.E.2d 303, 308; see *State v. Downs* (1977), 51 Ohio St.2d 47, 63, 5 O.O.3d 30, 38, 364 N.E.2d 1140, 1150.

Moreover, other evidence established that the arsonist had used accelerants, including dominant pour patterns to the burning on the wood deck and living room concrete. An accelerant was also found in wood chips from the deck floor. Thus, even if the rug had been wrongfully admitted, other

evidence of arson rendered any error harmless. Crim.R. 52(A).

In Proposition of Law IX, Richey argues that evidence of his pretrial statements violated his *Miranda* rights and Sixth Amendment right to counsel. Richey made several statements to police about the fire, denying any culpability. In one statement, Richey admitted he had broken into a greenhouse across the street and stolen some potted plants. The trial court denied Richey's motion to suppress, finding no constitutional violations.

Richey complains first about admission of a statement he made to Police Chief Miller on the morning of the fire. However, Miller initially interviewed Richey only as a possible witness to the fire, and Richey was not under arrest or in custody. Richey was free to leave as long as he stayed out of the fire fighters' way. Since no custodial interrogation occurred, Miller was not required to inform Richey of his constitutional rights. See *Oregon v. Mathiason* (1977), 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714; *Minnesota v. Murphy* (1984), 465 U.S. 420, 104 S.Ct. 1136, 79 L.Ed.2d 409.

Even if a custodial interrogation occurred, any error would be harmless beyond a reasonable doubt. In this brief June 30 statement, Richey said nothing about how the fire started, and the statement could not have harmed him before the trier of fact.

Around noon, Miller interviewed Richey again, but Miller then advised him of his *Miranda* rights before securing a second statement. On July 1, Richey was advised of his rights twice when he was arrested.

Richey further complains that his Sixth Amendment rights were violated by evidence about conversations he had while in pretrial confinement. On August 17, 1986, Richey threatened the prosecutor in a conversation with Deputy

Mike Ball. On November 19, Richey made further threats against the prosecutor and witnesses in a conversation with Deputy Roy Sergeant. In neither case did the deputies initiate the conversation or question Richey.

The *Miranda* safeguards do not preclude admission of this evidence because Richey initiated the conversations and also waived his right to have a lawyer present. Hence, the trial court did not err in declining to suppress Richey's statements. See *Rhode Island v. Innis* (1980), 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297; *Oregon v. Bradshaw* (1983), 462 U.S. 1039, 103 S.Ct. 2830, 77 L.Ed.2d 405; *Connecticut v. Barrett* (1987), 479 U.S. 523, 107 S.Ct. 828, 93 L.Ed.2d 920.

IV

Prosecutorial Misconduct

In Proposition of Law V, Richey argues that the prosecutor grievously erred in his final guilt-phase argument. However, "the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips* (1982), 455 U.S. 209, 219, 102 S.Ct. 940, 947, 71 L.Ed.2d 78, 87. Accord *State v. DePew* (1988), 38 Ohio St.3d 275, 288, 528 N.E.2d 542, 556-557; *State v. Johnson* (1989), 46 Ohio St.3d 96, 102, 545 N.E.2d 636, 642. Moreover, in a bench trial, trial judges are presumed to rely only upon relevant, material, and competent evidence, in arriving at their judgments. *State v. Post, supra*, 32 Ohio St.3d at 384, 513 N.E.2d at 759.

The prosecutor did not commit crucial errors. The prosecutor's reference to Richey as a sociopath or psychopath was a fair inference based on the evidence. In any event, it was not prejudicial before a panel of judges. *State v. Post, supra*. The prosecutor's varied comments about why accelerants had not shown up on Richey's clothing also

constituted fair comment. Prosecutors are entitled to latitude as to what the evidence has shown and what inferences can be drawn therefrom. *State v. Stephens* (1970), 24 Ohio St.2d 76, 82, 53 O.O.2d 182, 185, 263 N.E.2d 773, 777; see *State v. Byrd* (1987), 32 Ohio St.3d 79, 82, 512 N.E.2d 611, 616.

By referring to Richey's threats, the prosecutor referred to evidence in the record admitted without objection. The prosecutor's reference to the helpless victim, who was in a hopeless situation from which she could not escape, was brief and not prejudicial. See *Payne v. Tennessee* (1991), 501 U.S. , 111 S.Ct. 2597, 115 L.Ed.2d 720. Thus, Proposition of Law V is overruled.

V

Sufficiency of Evidence

In Proposition of Law VII, Richey argues that the circumstantial evidence at trial did not establish his identity as the arsonist and killer of Cynthia Collins. Richey argues the evidence is insufficient because testing failed to show accelerants on his clothing. However, Richey may not have spilled any gasoline or paint thinner on his clothing when he set the fire, or at least not on portions of the clothing eventually tested. Alternatively, the fatigues seized by the police on July 1 may not have been those worn by Richey on June 29-30.

Richey challenges the accuracy of the times that Altimus gave for statements she heard. However, Altimus may have been simply confused about when she heard Richey. Richey argues that he could not have set the fire because he was intoxicated and had a splint on his hand. However, he could still use that bandaged hand, and the evidence about his intoxication was conflicting.

In a review for sufficiency, the evidence must be considered in a light most favorable to the prosecution.

Jackson v. Virginia (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560; *State v. Davis* (1988), 38 Ohio St.3d 361, 365, 528 N.E.2d 925, 930. "* * * [T]he weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. DeHass* (1967), 10 Ohio St.2d 230, 39 O.O.2d 366, 227 N.E.2d 212, paragraph one of the syllabus. Murder convictions can rest upon circumstantial evidence. *State v. Nicely* (1988), 39 Ohio St.3d 147, 150, 529 N.E.2d 1236, 1239; *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 27, 514 N.E.2d 394, 402. Indeed, circumstantial evidence may be more certain, satisfying and persuasive than direct evidence. *State v. Lott* (1990), 51 Ohio St.3d 160, 167, 555 N.E.2d 293, 302. Accord *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492.

The evidence against Richey established that he was the killer and arsonist. Five days before the fire, Richey pulled a knife on Butler, who had just been in bed with Candy, and Richey had told Candy he would kill any new boyfriend she found. At the party, Richey was infuriated because Candy brought Nichols, kissed him repeatedly, and asked Nichols to spend the night with her. Dannenberger, Price, and Altimus all heard Richey say that Building "A" would burn that night, which Richey said more than once. The fire started three hours later.

The evidence shows that Hope Collins gave Richey access to her apartment and asked Richey to baby-sit Cynthia, and he agreed to do so. Moreover, Richey admitted to the police that he knew Cynthia was in her bedroom, since he had stopped to see her there during the party. Less than an hour after agreeing to baby-sit for her, Richey started the fire in Hope's apartment. Candy's apartment was immediately below Hope's apartment, and the latter's smoke detector had been ripped out of the ceiling and was hanging by the wires. Damage to the smoke detector may have delayed any warning about the fire.

Unrebutted expert witnesses asserted that the fire had been deliberately started, and that gasoline and paint thinner had been used as accelerants. Richey had access to a greenhouse where gasoline and paint thinner were stored; some of the gasoline and paint thinner could have been missing; and Richey admittedly had stolen plants from that greenhouse. Additionally, during the fire, Richey continued to challenge Nichols to a fight and reasserted to Candy that he would not let anyone else have her. To Altimus, the elderly neighbor, Richey bragged that he had done "a helluva good job" as he laughed and surveyed the fire damage.

The evidence also established Richey's intention to kill Candy and Nichols. Before the fire, Richey threatened Candy and any new boyfriend she would acquire. At the party, Richey specifically threatened to burn Building "A." He then set the fire in a jealous rage directed at Candy and her new boyfriend. "It is a fundamental principle that a person is presumed to intend the natural, reasonable and probable consequences of his voluntary acts." *State v. Johnson* (1978), 56 Ohio St.2d 35, 39, 10 O.O.3d 78, 80, 381 N.E.2d 637, 640; *State v. Lott, supra*, 51 Ohio St.3d at 168, 555 N.E.2d at 302.

The fact that the intended victims escaped harm, and that an innocent child, Cynthia Collins, was killed instead, does not alter Richey's legal and moral responsibility. "The doctrine of transferred intent is firmly rooted in Ohio law." *State v. Sowell* (1988), 39 Ohio St.3d 322, 332, 530 N.E.2d 1294, 1305. Very simply, "the culpability of a scheme designed to implement the calculated decision to kill is not altered by the fact that the scheme is directed at someone other than the actual victim." *State v. Solomon* (1981), 66 Ohio St.2d 214, 218, 20 O.O.3d 213, 216, 421 N.E.2d 139, 142.

Other states agree. Aside from a few states whose statutes require a different result, "there is a singular unanimity among the decisions in the overwhelming majority of the states that such a homicide 'partakes of the quality of the original act, so that the guilt of the perpetrator of the crime is exactly what it would have been had the blow fallen upon the intended victim instead of the bystander.'" *Gladden v. State* (1974), 273 Md. 383, 392, 330 A.2d 176, 181. Accord *State v. Julius* (1991), 185 W.Va. 422, 408 S.E.2d 1, and cases cited in *Gladden* and *Julius*.

In *Wareham v. State* (1874), 25 Ohio St. 601, 607, this court explained the reasons for this principle: "The purpose and malice with which the blow was struck is not changed in any degree by the circumstance that it did not take effect upon the person at whom it was aimed. The purpose and malice remain, and if the person struck is killed, the crime is as complete as though the person against whom the blow was directed had been killed, the lives of all persons being equally sacred in the eye of the law, and equally protected by its provisions."

A verdict will not be reversed "where there is substantial evidence upon which a jury could reasonably conclude that all the elements of an offense have been proven beyond a reasonable doubt." *State v. Eley* (1978), 56 Ohio St.2d 169, 10 O.O.3d 340, 383 N.E.2d 132, syllabus. In this case, substantial evidence existed to sustain all the elements of the offenses charged, and the panel's verdict stands.

VI

Miscellaneous Guilt Phase Issues

In Proposition of Law VIII, Richey argues that the trial court failed to minimize the risk of collusion among witnesses and that, hence, the guilty verdict was not reliable. At the trial, the court granted Richey's motion to separate witnesses in accordance with Evid.R. 615. Richey also asked

that witnesses be sequestered from each other and admonished not to discuss their testimony after they testified. The trial court denied that motion, ruling that possible discussion among witnesses could be tested on cross-examination.

R.C. 2945.03 specifies the right of a trial judge in a criminal trial to control the trial proceedings. Orders relating to witnesses are entrusted to the sound discretion of the trial court.

At trial, Richey failed to demonstrate any need for the measures he requested. Richey could question witnesses during cross-examination about any prior discussions. Richey also fails to cite specific instances of preventable discussions, or any prejudice from the lack of such orders, or any authority requiring such orders. Thus, Proposition of Law VIII lacks merit.

In Proposition of Law X, Richey argues that the trial court erred by not severing count three, the break-in at the K & J Greenhouse, from the other offenses. Richey argues that this offense was not related to the arson. However, the law favors joining multiple offenses in a single trial under Crim.R. 8(A). See *State v. Lott, supra*, 51 Ohio St.3d at 163, 555 N.E.2d at 298; *State v. Torres* (1981), 66 Ohio St.2d 340, 343, 20 O.O.3d 313, 315, 421 N.E.2d 1288, 1290. The K & J break-in was an integral part of the arson and thus part of "a common scheme or plan" or "a course of criminal conduct" under Crim.R. 8(A). Richey broke into the K & J Greenhouse, located across the street from the apartment complex, in the hours before the arson. Moreover, the break-in explained Richey's access to gasoline and paint thinner, which other evidence demonstrated were the accelerants used in the arson.

Even though joinder was possible, Richey argues that the trial court should have severed count three from the others

under Crim.R. 14. However, Richey has the burden to establish prejudice to his rights in accordance with Crim.R. 14. *State v. Torres, supra*, syllabus; *State v. Lott, supra*, 51 Ohio St.3d at 163, 555 N.E.2d at 298; *State v. Roberts* (1980), 62 Ohio St.2d 170, 175, 16 O.O.3d 201, 204, 405 N.E.2d 247, 251.

Richey failed to establish prejudice. Evidence of the joined crime, the break-in, was simple and direct and thus not possibly confusing. See *State v. Lott, supra*, 51 Ohio St.3d at 163, 555 N.E.2d at 298; *State v. Franklin* (1991), 62 Ohio St.3d 118, 122, 580 N.E.2d 1, 6. Moreover, the panel of judges could not have confused the separate offenses. *State v. Lott, supra*, 51 Ohio St.3d at 164, 555 N.E.2d at 298.

Additionally, evidence of that break-in would have been admissible, under Evid.R. 404(B), even if that offense had not been joined. Proof that Richey broke into the greenhouse established that he had the opportunity to discover and steal the paint thinner and gasoline stored there. Access to these accelerants was also part of his preparation to burn Building "A." See *State v. Jamison* (1990), 49 Ohio St.3d 182, 552 N.E.2d 180; *State v. Broom* (1988), 40 Ohio St.3d 277, 282, 533 N.E.2d 682, 690. Proposition of Law X lacks merit.

In Proposition of Law XIII, Richey argues that the state's failure to record grand jury testimony violated his due process and fair trial rights, necessitating reversal. Richey correctly points out that "[p]ursuant to Crim.R. 22 grand jury proceedings in felony cases must be recorded." *State v. Grewell* (1989), 45 Ohio St.3d 4, 543 N.E.2d 93, syllabus.

At trial, Richey expressed an interest in grand jury testimony only to avoid unnecessary voir dire of jurors. Richey subsequently waived a jury trial and therefore abandoned this basis for that request. On appeal, Richey asserts for the first time that he needed the transcripts to explore possible inconsistent statements by witnesses.

However, Richey established no basis at trial for any particularized need, and his general assertions do not establish particularized need now. "Grand jury proceedings are secret, and an accused is not entitled to inspect grand jury transcripts * * * unless the ends of justice require it and there is a showing by the defense that a particularized need for disclosure exists * * *." *State v. Greer* (1981), 66 Ohio St.2d 139, 20 O.O.3d 157, 420 N.E.2d 982, paragraph two of the syllabus.

Therefore, Richey was not entitled to the transcripts, even if they existed. The error in failing to record the testimony is harmless. See *State v. Grewell, supra*, 45 Ohio St.3d at 9, 543 N.E.2d at 98; *State v. Wickline* (1990), 50 Ohio St.3d 114, 122, 552 N.E.2d 913, 922.

In Proposition of Law XIV, Richey argues for reversal because the trial court failed to state essential findings under Crim.R. 12(E) when it denied Richey's motions to suppress his pretrial statements. However, Crim.R. 12(E) does not control because Richey did not request factual findings. "[I]n order to invoke the rule, the defendant must request that the court state its essential findings of fact in support of its denial of a motion." *State v. Benner* (1988), 40 Ohio St.3d 301, 317, 533 N.E.2d 701, 718; see *Bryan v. Knapp* (1986), 21 Ohio St.3d 64, 21 OBR 363, 488 N.E.2d 142. Moreover, the evidence necessitated the trial court's decision not to suppress the statements. Any error would be harmless. See Part III.

In Proposition of Law XVI, Richey argues that his rights to a complete record, the effective assistance of counsel, and meaningful appellate review were compromised because the visit to the crime scene was unrecorded. However, the trial court asked counsel before the visit, "Do you have any problem waiving the presence of the court reporter?" The

prosecutor said he did not, and defense counsel said nothing. At trial, neither counsel asked the court to describe the visit.

R.C. 2945.16 authorizes a view of a crime scene, and the trial court is vested with broad discretion in such matters. *State v. Zuern* (1987), 32 Ohio St.3d 56, 58, 512 N.E.2d 585, 588. A view of a crime scene is neither evidence nor a crucial stage in the proceedings. See *State v. Tyler* (1990), 50 Ohio St.3d 24, 38, 553 N.E.2d 576, 593; *Snyder v. Massachusetts* (1934), 291 U.S. 97, 108-109, 54 S.Ct. 330, 333, 78 L.Ed. 674, 679-680. The trial panel must be presumed to know and apply that principle. *State v. Post, supra.* Furthermore, Richey has not supplemented the record, pursuant to App.R. 9(C) or 9(E), in an effort to show prejudice from the lack of recording. The court cannot presume prejudice from an unrecorded visit to a crime scene. *State v. Watson* (1991), 61 Ohio St.3d 1, 15, 572 N.E.2d 97, 109; *State v. Tyler, supra*, 50 Ohio St.3d at 38, 553 N.E.2d at 593.

VII

Ineffective Assistance of Counsel

In Proposition of Law XV, Richey argues that his counsel ineffectively represented him, thereby depriving him of his Sixth Amendment rights. Reversal on this ground requires that the defendant show, first, "that counsel's performance was deficient" and, second, "that the deficient performance prejudiced the defense" so as to deprive the defendant of a fair trial. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693.

Richey complains first that his counsel failed to object to evidence about his threats to the prosecutor and witnesses. However, this evidence was arguably admissible and, in any event, made no difference at trial. See Part I. Richey also complains that his counsel did not attempt to disqualify the trial panel. However, counsel's tactical choice not to do so was within the range of professional discretion and cannot be

second-guessed on appeal. His counsel could also properly choose not to object to the presentence report. See *Strickland, supra*, at 689, 104 S.Ct. at 2065, 80 L.Ed.2d at 694.

The prosecution's use of the defense's arson expert as a state witness made no difference in view of the uncontradicted evidence of arson and accelerants. Counsel had moved to suppress Richey's pretrial statements, and did not fail in any essential duty by not asking for findings under Crim.R. 12(E), since those statements were properly admitted into evidence. The trial court properly sentenced Richey on different counts; hence, his counsel did not perform deficiently by not objecting to the imposed sentences.

In sum, Richey's counsel continued to function as the "counsel" guaranteed him by the Sixth Amendment. Moreover, no reasonable probability existed "that, were it not for counsel's errors, the result of the trial would have been different." *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph three of the syllabus. The prosecution had a strong case against Richey.

VIII

Constitutionality

We have previously rejected Richey's constitutional challenges in Propositions of Law XX and XXI to Ohio's proportionality review. See *State v. Jenkins* (1984), 15 Ohio St.3d 164, 176, 15 OBR 311, 321, 473 N.E.2d 264, 278; *State v. Steffen* (1987), 31 Ohio St.3d 111, 31 OBR 273, 509 N.E.2d 383, paragraph one of the syllabus. Despite Richey's claims in Proposition of Law XXII, Ohio's felony-murder statute is constitutional. See *State v. Henderson* (1988), 39 Ohio St.3d 24, 528 N.E.2d 1237, paragraph one of the syllabus. Despite Richey's claims in Proposition of Law XXIII, Ohio's law meets constitutional requirements for death penalty statutes. *State v. Combs* (1991), 62 Ohio St.3d 278, 291, 581 N.E.2d 1071, 1082; *State v. Steffen, supra*, 31

Ohio St.3d at 125, 31 OBR at 285, 509 N.E.2d at 396; *State v. Maurer* (1984), 15 Ohio St.3d 239, 15 OBR 379, 473 N.E.2d 768.

IX

Sentencing Errors

In Proposition of Law XI, Richey argues that imposing separate sentences for aggravated arson and aggravated murder violates R.C. 2941.25 and constitutional guarantees. In Proposition of Law XII, Richey pursues these same arguments in seeking to overturn separate sentences imposed for aggravated murder and endangering a child.

State v. Blankenship (1988), 38 Ohio St.3d 116, 117, 526 N.E.2d 816, 817, noted:

"This court has set forth a two-tiered test to determine whether two crimes with which a defendant is charged are allied offenses of similar import. In the first step, the elements of the two crimes are compared. * * * In the second step, the defendant's *conduct* is reviewed to determine whether the defendant can be convicted of both offenses." (Emphasis *sic.*) See, also, *State v. Mitchell* (1983), 6 Ohio St.3d 416, 418, 6 OBR 463, 464, 453 N.E.2d 593, 594; *State v. Logan* (1979), 60 Ohio St.2d 126, 128, 14 O.O.3d 373, 374, 397 N.E.2d 1345, 1348.

When the elements are compared, aggravated murder and aggravated arson are not allied offenses of similar import within the meaning of R.C. 2941.25. Aggravated murder requires purposefully causing the death of another while committing one of nine specified felonies, of which aggravated arson is only one. Moreover, aggravated arson does not require a purposeful killing; instead, it requires a substantial risk of physical harm by fire or explosion. Thus, "[t]he two offenses are not prerequisites, one for the other. To consummate either offense, the other need not by

definition be committed." *State v. Moss* (1982), 69 Ohio St.2d 515, 520, 23 O.O.3d 447, 450, 433 N.E.2d 181, 186. See, also, *State v. Bickerstaff* (1984), 10 Ohio St.3d 62, 10 OBR 352, 461 N.E.2d 892; *State v. Willey* (1981), 5 Ohio App.3d 86, 5 OBR 200, 449 N.E.2d 471 (aggravated arson and involuntary manslaughter are separately punishable).

Richey's Proposition of Law XII also lacks merit. Child endangering under R.C. 2919.22(A) and aggravated murder are not allied offenses of similar import. The elements of child endangering are the defendant's custody or control of a child under eighteen and his creation of a substantial risk to the health or safety of the child by violating a duty of care or protection. Aggravated murder is a purposeful killing in the course of one of nine specified felonies, none of which is child endangering. These offenses have entirely different elements. Cf. *State v. Anderson* (1984), 16 Ohio App.3d 251, 16 OBR 275, 475 N.E.2d 492 (child endangering and felonious assault are not allied offenses of similar import).

In Proposition of Law XVII, Richey complains the trial court erred in not giving any weight to relevant mitigation evidence. In Proposition of Law XIX, Richey argues the court of appeals failed to individually consider his particular character and family background.

Richey presented a variety of evidence concerning his personal history, character and background. Also, several mental health professionals concluded that Richey suffered from borderline and antisocial personality disorders. Richey reasons that this evidence was strongly mitigating and that the trial court and court of appeals erred by imposing a death sentence.

Contrary to Richey's claims, courts need not give weight to relevant mitigation evidence simply because they must consider such evidence under Supreme Court precedents. See *Eddings v. Oklahoma* (1982), 455 U.S. 104, 102 S.Ct. 869,

71 L.Ed.2d 1; *Skipper v. South Carolina* (1986), 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1. What weight to be given mitigation evidence is necessarily an individual decision by the fact finder. "* * * The fact that an item of evidence is admissible under R.C. 2929.04(B)(7) does not automatically mean that it must be given any weight." *State v. Steffen, supra*, paragraph two of the syllabus. See, also, *State v. Stumpf* (1987), 32 Ohio St.3d 95, 512 N.E.2d 598, paragraph two of the syllabus.

At times, we have assigned little or no weight to evidence of personality disorders or family background; hence, the trial court did not err when declining to give those factors any weight. See *State v. Cooey, supra*, 46 Ohio St.3d at 41, 544 N.E.2d at 919; *State v. Van Hook* (1988), 39 Ohio St.3d 256, 263, 530 N.E.2d 883, 889-890.

Richey's Proposition of Law XIX also lacks merit. The court of appeals did not err when it referred to millions of persons with backgrounds similar to Richey's. By so doing, the court simply reflected its view that his family background was not mitigating. We have used similar reasoning. See *State v. Dickerson* (1989), 45 Ohio St.3d 206, 218, 543 N.E.2d 1250, 1261; *State v. Broom, supra*, 40 Ohio St.3d at 294, 533 N.E.2d at 701.

The court of appeals' written opinion demonstrates that the court performed its constitutional obligation of giving "individualized consideration" to the appropriate penalty for Richey. *Lockett v. Ohio* (1978), 438 U.S. 586, 605, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973, 990; *Eddings v. Oklahoma* (1982), 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1. Moreover, our independent evaluation of the evidence cures any sentencing errors by the trial court or the court of appeals. See *Clemons v. Mississippi* (1990), 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725; *State v. Lott, supra; State v. Landrum* (1990), 53 Ohio St.3d 107, 559 N.E.2d 710.

X

Sentence Evaluation

In Proposition of Law XVIII, Richey argues that his death sentence was inappropriate based upon residual doubt, the admission of irrelevant evidence of threats, and overwhelming mitigation evidence. Richey does not dispute, and we find, that the aggravating circumstance, that the murder occurred during an aggravated arson, was proved beyond a reasonable doubt.

Richey presented extensive mitigating evidence that he suffered "borderline" and "antisocial" personality disorders. According to Dr. Leena Puhakka, a psychologist, Richey displayed classic symptoms of those personality disorders. Dr. Puhakka found Richey functioned at the emotional level of a ten- or eleven-year-old. Dr. Antoine Demosthene, a psychiatrist, found no evidence of psychosis or mental disease, although Richey was very socially maladjusted, and suffered antisocial personality disorder.

Dr. William McIntosh, a psychologist, testified that Richey frequently lied to manipulate the results of mental evaluations. He stated that Richey had come from a chaotic family background, had an early history of violence and drug abuse, and displayed erratic behavior and poor impulse control. Although not psychotic, Richey did have mental disorders, according to Dr. McIntosh.

Dr. Thomas Sherman, a board-certified psychiatrist testifying by deposition for the state, found Richey "extremely impulsive, self-centered, hedonistic." He stated that Richey did not display any psychosis or inability to understand the criminality of his acts or to refrain from those acts.

Evidence by psychiatrists and psychologists also revealed Richey's preoccupation with death, blood, and violence, and

his acts of self-mutilation and attempts at suicide resulting in over six hundred self-imposed scars and cuts on his body. Richey received his first mental health evaluation in January 1978, when thirteen years old, and has been briefly treated and evaluated for erratic behavior in various mental institutions.

Social worker Judith Tolliver described Richey as a blustering young man who suffered from a "histrionic behavior disorder" in addition to his other personality disorders. She found Richey not delusional, mentally impaired or actively psychotic but severely and chronically maladjusted.

Richey was born in Holland in August 1964, where his father was stationed as a member of the United States Armed Forces. His mother was Scottish. Richey was raised mostly in Scotland, where his parents lived. As a teenage boy in Scotland, Richey was arrested several times for fighting, larceny, and breaking and entering. Richey came to the United States in 1982 and worked for his father, and he also travelled to different cities and worked at different jobs. In 1984, Richey joined the Marine Corps, and he served for fourteen months before being honorably discharged. Richey also was married in Minnesota and fathered a son, but afterwards his wife divorced him.

Our independent assessment of the evidence reveals some mitigating features in Richey's history and background. Richey's mother abused alcohol and taught him to resent authority. Richey suffers from lifelong borderline and antisocial personality disorders. Richey also served more than a year in the United States Marine Corps and was honorably discharged. All of these factors are entitled to some mitigating weight. Otherwise, little else in Richey's history, character, or background is mitigating. Although Richey abused alcohol and drugs, nothing suggests a serious

drug addiction. On balance, his history, character and background do not offer substantial mitigating features.

Nothing in the nature and circumstances of the offense offers any mitigating features. Richey killed a defenseless child, whose safety had been entrusted to him, as a result of a blind, jealous rage directed at his exgirlfriend and her current lover. The fact that he killed an unintended victim rather than the intended victims does not alter his moral culpability under the firmly established doctrine of transferred intent. *State v. Solomon; Wareham v. State*, both *supra*. His ostensible efforts to save Cynthia did not help her and interfered with firemen's efforts to rescue her and fight the fire. Under the circumstances, nothing in the facts of the offense is mitigating.

The murder victim did not induce or facilitate the offense nor was Richey under "duress, coercion, or strong provocation"; hence, R.C. 2929.04(B)(1) and (B)(2) do not apply. Richey did not suffer, at the time of the offense, from a "mental disease or defect"; therefore, R.C. 2929.04(B)(3) did not apply. A behavior or personality disorder does not qualify as a mental defect or disease. *State v. Cooey; State v. Van Hook, supra*. Richey's age of twenty-one when he committed the offenses is a relevant statutory mitigating factor entitled to weight under R.C. 2929.04(B)(4). Richey's prior adjudications as a juvenile offender and his adult record of arrests and convictions preclude finding the lack of a record as a mitigating factor. See R.C. 2929.04(B)(5). The evidence shows that Richey was the only actor in these crimes; hence, R.C. 2929.04(B)(6) does not apply.

Richey suggests residual doubt as an "other factor," R.C. 2929.04(B)(7). Depending upon the facts, residual doubt can be a mitigating factor. *State v. Watson, supra*. However, the strong evidence of guilt in this case precludes awarding residual doubt any mitigating value.

Richey also argues that the admission of irrelevant evidence that he threatened the prosecutor and witnesses showed the unfairness of the trial and rendered the death penalty inappropriate. However, such evidence related to his "history, character, and background," R.C. 2929.04(B), and thus was relevant to the death penalty determination. Richey's background and his personality disorders are relevant under R.C. 2929.04(B)(7), but their impact has already been considered as part of his background and history. No other mitigation appears relevant as "other factors" under R.C. 2929.04(B)(7).

Despite this mitigation evidence, the aggravating circumstance outweighs any mitigating factors. In torching an apartment building at night, he jeopardized the lives of others in addition to killing an innocent two-year-old child. Applicable mitigating factors are of little weight when compared to the aggravating circumstance proved against him. His personality disorders did not rise to the level of substantial impairment of capacity under R.C. 2929.04(B)(3). Many criminals have personality disorders. Thus, his background did not contain any substantial mitigating features.

The death penalty is appropriate and proportionate when compared with similar felony murder cases. See *State v. Bonnell* (1991), 61 Ohio St.3d 179, 573 N.E.2d 1082 (felony murder); *State v. Lott, supra* (felony murder, victim set on fire); *State v. Seiber* (1990), 56 Ohio St.3d 4, 564 N.E.2d 408 (felony murder); *State v. Powell* (1990), 49 Ohio St.3d 255, 552 N.E.2d 191 (felony murder, seven-year-old victim); *State v. DePew, supra* (felony murder including arson, three victims including a seven-year-old); *State v. Morales* (1987), 32 Ohio St.3d 252, 513 N.E.2d 267 (felony murder, twelve-year-old victim); *State v. Buell* (1986), 22 Ohio St.3d 124, 22 OBR 203, 489 N.E.2d 795 (felony murder, eleven-year-old

victim); *State v. Maurer, supra* (felony murder, seven-year-old victim).

Accordingly, we affirm the convictions and sentence, including the death penalty.

Judgment affirmed.

Holmes, Douglas and Resnick, JJ., concur.

Sweeney, Wright and H. Brown, JJ., dissent.

Herbert R. Brown, J.

I must respectfully dissent. For the reasons set forth below, I would overturn the sentence of death.

R.C. 2929.05 requires us to undertake a three-part analysis: the court must review proposed errors, weigh aggravating circumstances against mitigating factors, and compare the sentence to those imposed in similar cases. I disagree with all three parts of the majority's analysis.

I

Mitigation

The majority asserts that "[n]othing in the nature and circumstances of the offense offers any mitigating features." This statement is shocking, in view of the fact that Richey actively tried to save Cynthia Collins. His efforts were not "ostensible," as characterized by the majority; Richey put his own life in danger by physically being in the burning apartment. He repeatedly and hysterically told the firemen and anyone else nearby: "there's a baby in there." He also told the firemen where Cynthia was in the apartment. The majority cruelly misconstrues the evidence when it asserts that the defendant's efforts interfered with those of the firemen. The defendant was overwrought in his concern for the child. While there is some evidence that his presence

(because he was overwrought) was not helpful, this is in no sense contradictory to the fact that defendant's desire was to save the child. Further, the officials clearly identified in the record as physically restraining Richey and keeping him away from the apartment were special deputies and a police officer in civilian clothing. These people would not and could not have directly fought the fire or rescued Cynthia.

In addition, no evidence of any animus toward Cynthia was presented. In fact, the prosecutor admitted in oral argument before this court that there was no evidence that Richey had any intent to kill Cynthia. Chief of Police Miller testified that Richey was concerned about Cynthia, and special agent Chandler testified that Richey repeatedly asked about Cynthia while the fire was being put out. Richey's rescue attempt and the fact that the victim was unintended are strong mitigating factors that should have been considered in this case. When these factors are considered, the balance shifts against the death penalty.

II

Claims of Error

The majority dismisses several of the defendant's propositions of law without real analysis of the issues.

A

Evidence of Threats

Several of defendant's propositions of law deal with evidence that he made threats against the prosecutor and potential witnesses while in custody. The majority first contends that the issue of admissibility of these threats is waived. Richey did move to suppress the statements, and the fact that he did not specifically object to their admissibility does not automatically mean they are waived. "* * * [A]n appellate court need not consider an error which a party complaining of the trial court's judgment could have called,

but did not call, to the trial court's attention at a time when such error could have been avoided * * *." *State v. Williams* (1977), 51 Ohio St.2d 112, 117, 5 O.O.3d 98, 101, 364 N.E.2d 1364, 1367. Richey brought this error to the trial court's attention by the motion to suppress, and thus there is no waiver. See, generally, *State v. Long* (1978), 53 Ohio St.2d 91, 7 O.O.3d 178, 372 N.E.2d 804.

The majority also contends that Richey's threats "reflect a consciousness of his guilt," and should therefore be admissible. It is by no means clear that this is so. A person wrongly accused could easily take out his frustration and anger in this fashion. In particular, Richey's anti-social and borderline personality traits might make the urge to lash out from a false accusation stronger. In any case, jailhouse threats are of a different order than flight from prosecution or a coverup as evidence of guilt.

The threats made by Richey are, pure and simple, acts separate and distinct from the one for which he was being tried. Proof of such threats can be admitted during the guilt phase only to show motive, opportunity, intent, plan, and so forth. (Evid.R. 404[B].) As the threats came after the events for which Richey was being tried, none of these factors can possibly be proved by evidence of later threats. Therefore the evidence is inadmissible for the guilt phase of trial, and it was error for the trial court to admit it.

Nor should evidence of the threats have been used in the sentence deliberations. The majority contends that this evidence is part of his "history, character, and background" and that any criminal wrongdoing is properly included in a presentence report. The cases cited for this proposition are easily distinguishable from the present situation. In *State v. Cooey* (1989), 46 Ohio St.3d 20, 544 N.E.2d 895, the presentence investigation report included under the heading "Prior Criminal Record" allegations for which the defendant

had never been tried. The majority in that case held that the statements were permissible in the presentence report under "social history" of the defendant. The incidents referred to were a violent assault and a sexual assault on a small child, not jailhouse threats. In *State v. Hutton* (1990), 53 Ohio St.3d 36, 559 N.E.2d 432, it was the defendant's arrest record that was at issue. A defendant's arrest record is part of his "prior criminal record," and thus can be included in a presentence report. *Id.* at 43, 559 N.E.2d at 441. Richey's threats were not part of a "prior criminal record," as they occurred after the events for which he is being tried, and he has never been charged or convicted of anything stemming from the threats.

Evidence of Richey's threats relates to his history, character or background in only the most marginal way. Its prejudicial impact is clear from the court's own actions; the judges thought Richey so dangerous that they had him shackled during the trial and allowed deputies to carry firearms and search people entering the courtroom. Considering these factors, evidence of the threats was not properly used either in the guilt phase or in sentence deliberations.

B

Letter

While in pretrial custody, Richey wrote a letter to a friend in Scotland. The trial court originally suppressed the letter as irrelevant to either the guilt or penalty phase. The letter was later included in the presentence report.

The majority contends that "[a]rguably that letter was relevant to the sentencing decision." I fail to see how it could have been relevant. The letter is simply a written version of the same threats Richey made verbally, n1 as well as more "other acts" evidence about events in Scotland which occurred years earlier. The letter is highly prejudicial, in particular Richey's reference to bringing back the death

penalty in Scotland. The same objections made above to the admissibility of the verbal threats apply here. The letter is not part of a prior criminal record, and any relation to Richey's history, character and background is tenuous at best. This, together with its highly prejudicial nature, should have made the letter inadmissible in the sentencing deliberations.

> n1 The threats in the letter were not even directed toward the parties threatened, but were more in the nature of boasts to Richey's friend in Scotland.

In addition, Richey's objection to the letter was not waived. Error as to the letter had been brought to the trial court's attention in the original motion to suppress. It was prejudicial error for the trial court to have admitted the letter in the presentence report. n2

> n2 "* * * The report should include only such information as is directly relevant to the aggravating and mitigating circumstances. * * *" *State v. Glenn* (1986), 28 Ohio St.3d 451, 28 OBR 501, 504 N.E.2d 701, paragraph two of the syllabus.

III

Proportionality of the Death Penalty

Besides reviewing the claims of error and weighing aggravating circumstances against mitigating factors, we must decide whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases. It is this last part of the analysis which most clearly reveals how inappropriate the death penalty is in this case.

Several cases are cited by the majority to show the proportionality of the death penalty in this case. However, if one reads those cases (which are merely listed and not analyzed by the majority), it is obvious that not one is remotely similar to this one. The defendant in *State v. Bonnell* (1991), 61 Ohio St.3d 179, 573 N.E.2d 1082, shot the victim at close range and then beat him. In *State v. Lott* (1990), 51 Ohio St.3d 160, 555 N.E.2d 293, the victim was directly doused with lamp oil and set on fire. In *State v. Seiber* (1990), 56 Ohio St.3d 4, 564 N.E.2d 408, the defendant had been roaming a bar and threatening patrons with a loaded gun. The victim refused to lie down when ordered, and defendant shot him in the back. In *State v. Powell* (1990), 49 Ohio St.3d 255, 552 N.E.2d 191, the defendant kidnapped a seven-year-old girl intending to rape her. He partially asphyxiated her and threw her out a fourth-story window. Although arson is involved in *State v. DePew* (1988), 38 Ohio St.3d 275, 528 N.E.2d 542, the victims all died of multiple stab wounds inflicted before the fire was started. In *State v. Morales* (1987), 32 Ohio St.3d 252, 513 N.E.2d 267, a twelve-year-old boy was savagely beaten to death in revenge for something his brother had done. The victim in *State v. Buell* (1986), 22 Ohio St.3d 124, 22 OBR 203, 489 N.E.2d 795, had been kidnapped, sexually assaulted and strangled. The victim in *State v. Maurer* (1984), 15 Ohio St.3d 239, 15 OBR 379, 473 N.E.2d 768, had been kidnapped, sexually assaulted and shot. In each case, the defendant had clear animus toward the victim, or harmed the victim in a direct, face-to-face encounter, or both.

Cases of transferred intent where the death penalty was imposed also involve face-to-face violent encounters between victim and defendant. For example, in *State v. Sowell* (1988), 39 Ohio St.3d 322, 530 N.E.2d 1294, defendant forced his way into the apartment where his intended victim was a

guest. Rather than be escorted outside by the person who opened the door, defendant shot him in the head.

I find no case in Ohio where a defendant in a felony murder case has been put to death unless he had specific animus towards the victim, or a direct, violent, face-to-face encounter with the victim, or both. n3 As discussed above, there is no evidence that Richey had specific animus towards Cynthia Collins. On the contrary, he showed concern for her life while the fire was in progress. Even if the defendant's intent can be inferred from the circumstances, or transferred from the animus shown towards others, the circumstances involve no specific animus or face-to-face violent encounter. There is a stunning difference between this case and those cited as comparable by the majority.

n3 The facts in the case of *State v. Thompson* (1977), 55 Ohio App.2d 17, 9 O.O.3d 190, 379 N.E.2d 245, are similar to those in this case. Firemen died as a result of fighting an arson fire in a restaurant. The court of appeals found that the trial judges were justified in finding intent from the act of arson, plus defendants' knowledge that others were actually exposed to the danger they created. The case was never reviewed by this court, nor was the death penalty imposed. I believe that it reaches too far to find intent to kill a fireman from the act of arson and the knowledge of danger alone. If this were the rule, any time someone dies in an arson fire the defendant would be guilty of aggravated murder. This essentially abrogates the longstanding Ohio rule that specific intent is needed for aggravated murder, and would render it no different from felony murder in other states.

Under the Eighth and Fourteenth Amendments to the United States Constitution, as well as R.C. 2929.05, we are obligated to perform a *meaningful* proportionality review of the death penalty in every case. See *Gregg v. Georgia* (1976), 428 U.S. 153, 173, 187, 204-206, 223-224, 96 S.Ct. 2909, 2925, 2931-2932, 2939-2940, 2948-2949, 49 L.Ed.2d 859, 875, 882, 892-893, 902-903; see, also, *Furman v. Georgia* (1972), 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346. Such a review deserves more than lip service and a listing of cases which are in no sense comparable to this one. There has been no meaningful proportionality review in this case. The death penalty is not warranted, and I must dissent.

Sweeney and Wright, JJ., concur in the foregoing dissenting opinion.

APPENDIX G

STATE OF OHIO,

PLAINTIFF-APPELLEE,

v.

KENNETH RICHEY,

DEFENDANT-APPELLANT

Case No. 12-87-2

Court of Appeals of Ohio,
Third Appellate District,
Putnam County

December 28, 1989, Decided

MR. RANDALL M. DANA, Ohio Public Defender, MS. JANE PERRY, Columbus, Ohio, For Appellant.

MR. DANIEL R. GERSCHUTZ, Prosecuting Attorney, Ottawa, Ohio, For Appellee.

SHAW, J., EVANS, P.J. and BRYANT, J., concur.

OPINION

SHAW, J. This is an appeal by the defendant, Kenneth T. Richey, from a judgment of conviction and sentence of death rendered in the Common Pleas Court of Putnam County, Ohio for aggravated arson, breaking and entering, child endangering, and the aggravated murder of Cynthia Collins.

On June 30, 1986, at approximately 4:15 A.M., a fire was discovered in the apartment of cope Collins, located in the Old Farm Village Apartment complex in Columbus Grove,

Putnam County, Ohio. The only person in the apartment was Ms. Collins' daughter, two year old Cynthia Collins, who died as a result of the fire.

On July 10, 1986, the defendant was indicted by the Putnam County Grand Jury on one count of aggravated murder with the specification that the offense was committed during the commission of an aggravated arson. The Putnam County Grand Jury also indicted the defendant for aggravated arson, breaking and entering, involuntary manslaughter and child endangering.

On July 14, 1986, the defendant pled not guilty and not guilty by reason of insanity to all counts in the indictment and the specification. On December 12, 1986, the defendant withdrew his plea of not guilty by reason of insanity and waived his right to a trial by a jury.

On January 5, 1987, trial to a three judge panel commenced. On January 8, 1987, the panel returned its verdict finding the defendant guilty of aggravated murder and the death penalty specification. The defendant was also found guilty of aggravated arson, breaking and entering, and child endangering. The court dismissed the involuntary manslaughter charge finding it to be a lesser included offense.

After one continuance, the penalty phase of the trial began on January 26, 1987. On that same day, the three judge panel sentenced the defendant to death for the aggravated murder of Cynthia Collins and imposed consecutive sentences on the remaining charges. The decision of the court was journalized on February 2, 1987, and the opinion of the trial court was filed on February 9, 1987. The defendant filed his notice of appeal in this court on March 10, 1987.

The brief filed by the defendant contains twenty-two assignments of error. We shall review each assignment in the order in which it was argued.

1. "Ohio's multiple counts statute, R.C. 2941.25 was violated when appellant was sentenced for both aggravated murder and aggravated arson, thereby denying appellant his statutory and constitutional Double Jeopardy and Due Process Protections."

The defendant contends that aggravated murder, as defined in R.C. 2903.01(B), and aggravated arson, as defined in R.C. 2909.02(A), are allied offenses of similar import within the contemplation of R.C. 2941.25 because the crimes were committed incidentally to each other. Therefore, the defendant argues, he cannot be convicted for both crimes under R.C. 2941.25(A).

R.C. 2941.25 provides that:

(A) "Where the same conduct by defendant can be construed to constitute two or more offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

(B) "Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment may contain counts for all such offenses and the defendant may be convicted of them all."

In State v. Moss (1982), 69 Ohio St. 2d 515, 519, the Ohio Supreme Court held R.C. 2941.25 "* * * has authorized trial courts, in a single criminal proceeding, to convict and sentence a defendant for two or more offenses, having as their genesis the same criminal conduct or transaction, provided that the offenses were not (1) allied and of similar import, (2) were committed separately or (3) were committed with a separate animus as to each offense."

In determining whether the defendant's conviction for aggravated murder and aggravated arson violates R.C. 2941.25 we are guided by principles set forth in State v. Donald (1979), 57 Ohio St. 2d 73 and State v. Logan (1979), 60 Ohio St. 2d 126 wherein the Supreme Court of Ohio recognized that in order for two crimes to constitute allied offenses, the crimes and their elements must correspond to such a degree that the commission of one offense will result in the commission of the other offense.

The elements of aggravated murder under R.C. 2903.01(B) are:

(1) Purposely causing another's death.

(2) While committing * * *

(3) Kidnapping, rape, aggravated arson, arson, aggravated robbery, robbery, aggravated burglary or escape.

The elements of aggravated arson under R.C. 2909.02(A)(1) are:

(1) Knowingly

(2) Create a substantial risk of serious physical harm to any person.

(3) By means of fire

Having reviewed these elements, we are of the opinion that the crimes of aggravated murder and aggravated arson are not allied offenses of similar import. Accord State v. Hayes (Sept. 23, 1981) Hamilton App. No. C-800 805, unreported.

R.C. 2903.01(B), by its nature, requires a purpose to cause the death of another while engaged in one of nine

felonies. R.C. 2909.02(A)(1) requires, by its nature, a fire and knowingly creating a substantial risk of serious physical harm to any person. The two criminal offenses are not, by their very nature, committed for the same purpose.

Moreover, the commission of aggravated murder does not require arson as the underlying felony in the felony murder subsection; it may be any of nine felonies. Likewise, the commission of aggravated arson need not result in aggravated murder. Clearly, the crimes and their elements do not correspond to such a degree that commission of one offense constitutes commission of the other, nor is the commission of one merely incidental to the other. Thus, the trial court acted within the sentencing authority of R.C. 2941.25(B) when it sentenced the defendant on the convictions for aggravated arson and aggravated murder.

The defendant also contends that his convictions for both aggravated murder and aggravated arson violate the Double Jeopardy Clause. It is well established that the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution prohibits multiple punishments for the same offense. North Carolina v. Pearce (1969), 395 U.S. 711.

In Blockberger v. U.S. (1932), 284 U.S. 299, 304. The United States Supreme Court established the following test for determining whether two offenses are sufficiently distinguishable to constitutionally permit the imposition of cumulative punishment:

"The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not."

Clearly, R.C. 2903.01(B) and 2909.02(A)(1) each require proof of a fact that the other does not.

"A felony murder rising to the level of R.C. 2903.01(B) requires proof of the death of another while committing or attempting to commit any of nine listed offenses, only one of which is aggravated arson. Aggravated arson, on the other hand, requires no proof of death, but only of substantial risk of serious physical harm to another." State v. Hayes, supra, at page 5.

Thus, we conclude that, in the case sub judice, the imposition of cumulative punishment did not violate the Double Jeopardy Clause. Accordingly, the defendant's first assignment of error is not well taken.

2. "Ohio's multiple count statute, R.C. 2941.25, was violated when appellant was sentenced for both aggravated murder and child endangering, thereby denying appellant his statutory and constitutional Double Jeopardy and Due Process protections."

The defendant, under this assignment of error, makes an identical argument to that in the preceding assignment of error, except that he now contends that convictions for aggravated murder, as defined in R.C. 2902.01(B), and child endangering, as defined in R.C. 2919.22(A), are precluded under R.C. 2941.25. Having previously set forth the Donald-Logan test used in the application of R.C. 2941.25, we now proceed directly to a determination of the merits of the defendant's claim.

The elements of child endangering under R.C. 2919.22(A) are:

(1) Person having custody or control of a child under 18 * * *

(2) Did create a substantial risk to the health and safety of the child * * *

(3) Resulting in physical harm to the child.

Having compared the elements of child endangering to those elements of aggravated murder under R.C. 2903.01(B), we are of the opinion that the two crimes are not allied offenses of similar import.

R.C. 2903.01(B), by its nature, requires a purpose to cause the death of another while engaged in any of nine felonies, none of which is child endangering. R.C. 2919.22(A), by its nature, requires only the creation of a substantial risk to the safety or health of a child in the offender's custody which results in physical harm to the child. The requisite culpability and proof necessary to establish each offense is therefore entirely different.

Moreover, one of the elements of R.C. 2919.22(A) is that a person be under the custody or control of the defendant. Therefore unless the child is under the custody or control of the defendant, a child endangering charge cannot be sustained. As custody and control is not a necessary finding for an aggravated murder charge, child endangering clearly requires proof of an additional element. Thus, it cannot be said that the elements of child endangering and aggravated murder correspond to such a degree that commission of the latter offense will result in the commission of the former offense. We therefore conclude that the trial court acted within the sentencing authority of R.C. 2941.25(B) when it sentenced the defendant on the convictions for aggravated murder and child endangering.

The defendant, under this assignment of error, also contends that his convictions for aggravated murder and child endangering, violate the Double Jeopardy Clause.

Clearly, R.C. 2903.01(B) and 2919.22(A) each require proof of an additional fact which the other does not. See, Blockberger v. U.S., supra. A felony murder rising to the level of R.C. 2903.01(B) requires proof of the death of

another while committing or attempting to commit any of nine listed offenses. Child endangering, on the other hand, requires no proof of death, but does require, unlike R.C. 2903.01(B), that the victim be in the custody or control of tie defendant.

Thus, we conclude that the imposition of multiple punishment did not violate the Double Jeopardy Clause. Accordingly, the defendant's second assignment of error is not well taken.

3. "A death sentence based upon a sole aggravating circumstance which merely duplicates an element of the underlying crime is violative of the Eighth and Fourteenth Amendments to the United States Constitution and Section 9, Article I, of the Ohio Constitution."

The Ohio Supreme Court, in State v. Poindexter (1988), 36 Ohio St. 3d 1, paragraph one of the syllabus, certiorari denied (1988), U.S. , 109 S. Ct. 272, stated:

"When issues of law in capital cases have been considered and decided by this court and are raised anew in a subsequent capital case, it is proper to summarily dispose of such issues in the subsequent case."

This assignment of error was addressed and rejected in State v. Jenkins (1984), 15 Ohio St. 3d 164, certiorari denied (1985), 472 U.S. 1032, rehearing denied (1985), 473 U.S. 973; and State v. Byrd (1987), 32 Ohio St. 3d 79, certiorari denied (1988), U.S. , 108 S. Ct. 763, rehearing denied (1988), U.S. , 108 S. Ct. 1252. Accordingly, the defendant's third assignment of error is not well taken.

4. "The state's circumstantial evidence was insufficient, as a matter of law, to prove every essential element of the capital crime with which he was charged. Because appellant's capital conviction was based on insufficient evidence, he was

deprived of the due process of law guaranteed by the Fourteenth Amendment to the United States Constitution and Section 16, Article I, of the Ohio Constitution, and his conviction must be vacated.

5. "Appellant's conviction of this capital offense was against the manifest weight of the evidence. In the interests of justice, that conviction must be reversed."

The defendant first contends that his conviction for aggravated murder was based entirely upon circumstantial evidence and, as such, the evidence did not rebut alternative theories supporting his innocence. The defendant rests his argument primarily upon the syllabus of State v. Kulig (1974), 37 Ohio St. 2d 157, which states as follows:

"Circumstantial evidence relied upon to prove an essential element of a crime must be irreconcilable with any reasonable theory of an accused's innocence in order to support a finding of guilt."

In State v. Williams (1976), 47 Ohio App. 2d 330, 336, this court, relying upon State v. Sheppard (1956), 165 Ohio St. 293, paragraph 6 of the syllabus, concluded that the determination required under the syllabus of State v. Kulig, supra, was clearly a factual question for the jury.

Two years after our decision in State v. Williams, supra, the Supreme Court of Ohio confirmed our conclusion that the determination that the circumstantial evidence is irreconcilable with any reasonable theory of an accused's innocence is a factual question for the jury. See, State v. Gravens (1978), 54 Ohio St. 2d 114, 118. Accordingly, in a case where circumstantial evidence is relied upon, once the trier-of-fact has reached its decision, "* * * an appellate court * * * will reverse only where the evidence is insufficient as a matter of law to enable the jury to exclude a reasonable hypothesis of innocence." State v. Gravens, supra, at p. 119.

The fare that caused the death of Cynthia Collins was discovered on June 30, 1986, at approximately 4:15 A.M. The record in this case establishes that throughout the evening of June 29, 1986 and the early morning hours of June 30, 1986, the defendant and several residents of the Old Farm Village Apartments attended a party at the apartment complex. Among those individuals attending the party, was Candy Barchett, who was a resident of Unit A of the apartment complex.

Several days prior to the fire, Ms. Barchett had broken off a short but rather intense relationship with the defendant. On the night of June 29, 1986, Ms. Barchett attended the party with her new boyfriend, Mike Nichols. Upon leaving the party, Barchett did so in company of Nichols and retired with him to her apartment in Unit A.

Ms. Barchett testified that during the course of her relationship with the defendant, he had warned her that he would kill any other man that she got involved with. Three witnesses, who attended the party at the Old Farm Village Apartments, testified that during the evening of June 29, 1986, the defendant stated his intent to burn down Unit A of the apartment complex. All three of the witnesses agreed that, when the defendant made the statement, he was angry, and at least one of the witnesses attributed the defendant's anger to Ms. Barchett's presence with Nichols.

At approximately 3:00 A.M. on June 30, 1986, after the pay had broken up, several men arrived at the apartment complex and asked Hope Collins to go for a ride. Hope Collins testified that she agreed to leave with the men and that she then asked the defendant to babysit for her daughter, Cynthia, who was asleep in the Collins' apartment located on the second floor, directly above Ms. Barchett's apartment in Unit A.

As Hope Collins drove away with her friends, she saw the defendant head up the steps toward the door of her apartment. Approximately 30 to 35 minutes later, the fire in the Collins' apartment was discovered.

The defendant was the first person to the scene of the fire. Upon arrival at the scene, firefighters and law enforcement officials saw the defendant standing at the door attempting to enter the burning apartment. The defendant was yelling that a child was in the apartment.

Juanita Altimus, an elderly resident of the apartment complex, testified that subsequent to the fire, the defendant stated to her "it looks like I did a helluva good job, didn't I."

Ms. Altimus admitted that she was not entirely certain of the date and place that the statement was made and that her testimony at trial conflicted with earlier statements to the police in this regard. However, the witness testified with certainty that the statement was in fact made by the defendant.

In addition to the foregoing testimony, the state produced the defendant's taped statement to Assistant State Fire Marshall Robert Cryer admitting that on the night of the fire, he had broken into the K&J Greenhouse, located across the street from the apartment complex, and stolen some plants. The owner of the greenhouse testified that both paint thinner and gasoline were stored in his business, and were accessible to anyone on the premises.

The state also produced samples of wood chips taken from the porch of the Collins' apartment, and samples from the carpet inside the apartment. Assistant State Fire Marshall Cryer testified that laboratory tests detected traces of paint thinner and gasoline in the samples and he, therefore, concluded that the fire was an arson.

Cryer also testified that burn or pour patterns on the cement floor beneath the carpet and on the wooden porch also led him to conclude that the fire was arson related. In addition, Gregory DuBois, an independently retained consulting engineer, testified that he concurred in Cryer's conclusion that accelerants were used to ignite the fire.

Taking all the evidence in this case and considering the authority set forth above, we cannot say that the evidence, albeit circumstantial, was insufficient as a matter of law to enable the three judge panel, as the trier of fact, to exclude a reasonable hypothesis of innocence. State v. Graven, supra.

The defendant cites several aspects of the state's case as being "vague, uncertain, conflicting, and fragmentary" to support his argument that the verdict was against the weight of the evidence. However, having reviewed the entire record, we conclude that there was sufficient evidence for the trier of fact to find the defendant guilty beyond a reasonable doubt, and therefore we will not reverse the verdict as being against the weight of the evidence. See State v. Brown (1988), 38 Ohio St. 3d 305. Accordingly, the defendant's assignments of error four and five are not well taken.

6. "The trial court erred when it permitted the Assistant State Fire Marshall to testify as to two exhibits which the State failed to prove the chain of custody. The court further erred when it permitted those exhibits to be admitted into evidence, in violation of Appellant Richey's rights under the Fifth and Fourteenth Amendments to the United States Constitution and Sections 10 and 16, Article I, of the Ohio Constitution."

The exhibits in question were samples taken from the carpet which was inside the Collins' apartment at the time of the fire. At some point subsequent to the fire, the carpet was removed from the apartment by the manager of the complex and was taken to a dump site. Members of the Putnam

County Sheriff's Department retrieved the carpet from the dump site on July 1, 1986, approximately 36 hours after the fire had occurred. Samples from the carpet were taken two or three weeks later and laboratory tests revealed traces of paint thinner and gasoline in the samples. In the course of obtaining the samples, the carpet was laid out in the sheriff's department parking lot.

Based on the foregoing events, the defendant argues that the exhibits were not properly authenticated or identified, because the State failed to establish a continuous chain of custody of the carpet and also failed to establish that the carpet was not tainted by having been left at the dump site, or laid out on the sheriff's department parking lot.

"* * * Although the State bears the burden of establishing a proper chain of custody, that duty is not absolute. State v. Moore (1973), 47 Ohio App. 2d 181, * * *. The State need only establish that it is reasonably certain that substitution, alteration, or tampering did not occur. Id. Moreover, breaks in the chain of custody go not to the admissibility of evidence, but to the weight afforded it. [Citations omitted.]". State v. Blevins (1987), 36 Ohio App. 3d 147, 150, motion for leave to appeal overruled (June 10, 1987), No. 87-524.

Here, the carpet samples offered at trial, and about which testimony was offered, were sufficiently identified as having been taken from the carpet that was inside the Collins' apartment at the time of the fire. Deputy Sheriff Todd Pingle testified that he retrieved the carpet from the dump site less than 36 hours after the fire. There was no question that the carpet so retrieved was in fact the same carpet that was inside the Collins' apartment. Subsequently, the carpet remained in the possession of the sheriff's department until the Assistant State Fire Marshall took his samples. The samples were sealed in a can and delivered to the Ohio Arson Crime Lab to determine the presence of accelerants.

We conclude that sufficient foundational evidence was offered by the state to support a finding that the primary evidence was what its proponent claimed it to be. Evid. R. 901(A). That there was a break in the chain of custody that could have possibly resulted in contamination of the carpet goes to the weight rather than the admissibility of the exhibits.

Moreover, any possible contamination of the carpet, by having been laid on the sheriff's department parking lot, likewise goes to the weight to be accorded the evidence, rather than its admissibility. Accordingly, the defendant's sixth assignment or error is not well taken.

7. "The sentence of death imposed on Appellant Richey was unreliable and inappropriate. The death sentence in appellant's case violates the Eighth and Fourteenth Amendments to the United States Constitution, and Sections 9 and 16, Article I, of the Ohio Constitution."

The defendant first contends that his conviction and sentence of death was unreliable because of error in the admission of evidence that occurred during the guilt phase of the trial and also because of the circumstantial nature of the state's case.

R.C. 2929.05(A) requires this court to review all of the facts and other evidence to determine if the evidence supports the finding of the aggravating circumstances by the panel of three judges. Inasmuch as this assignment of error raises the issue of the sufficiency of the evidence to support the finding of the aggravating circumstance, we will address the defendant's specific arguments and also conduct the review of the evidence required by R.C. 2929.05(A).

In conducting our review, we first address the defendant's argument that his conviction was unreliable because of testimony by two deputy sheriffs regarding the

defendant's threats on the life of the prosecutor and a past attempt on the life of his own father. The defendant contends that the sole purpose of this testimony was to improperly show his propensity for crime.

We first note that defense counsel failed to raise any objection during the trial to the testimony in question. Failure to object to an alleged error at the time of trial constitutes a waiver of the claim of error absent a showing of plain error. See, State v. Wade (1978), 53 Ohio St. 2d 182. Pursuant to our findings under defendant's fifteenth assignment of error, which is identical to the issue discussed herein, we find no plain error.

Moreover, we must indulge in the usual presumption that, in a bench trial in a criminal case, the court considered only the relevant, material and competent evidence in arriving at its judgment unless it affirmatively appears to the contrary. See, State v. Post (1987), 32 Ohio St. 3d 380, certiorari denied (1988), U.S. , 108 S. Ct. 1061, rehearing denied (1988), U.S. , 108 S. Ct. 1492. Thus, we are not persuaded that the testimony in question undermined the reliability of the defendant's conviction.

We turn now to a review of the evidence to determine whether it supports the finding of the aggravating circumstance by the three judge panel.

In this case, the defendant was charged with one aggravating circumstance in his indictment as follows:

"Count One On or about June 30, 1986 one Kenneth Richey did purposely cause the death of another, to wit: Cynthia Collins, while committing or attempting to commit, or while fleeing immediately after committing, or attempting to commit, aggravated arsón under Revised Code Section 2909.07(A)(1) with the following specifications.

"Specification to Count One. The grand jurors further find and specify that pursuant to Ohio Revised Code Section 2929.04(A)(7) the offense was committed while Kenneth Richey was committing, attempting to commit, or fleeing immediately after committing aggravated arson in violation of Ohio Revised Code Section 2909.02(A)(1) and Kenneth Richey being the principal offender in the commission of the aggravated murder and that offense is punishable by death or imprisonment for life in violation of Ohio Revised Code Section 2903.01(B)."

We find that the evidence in the record supports the finding of the aggravating circumstance beyond a reasonable doubt.

As noted earlier, under Assignment of Error Nos. 4 and 5, the evidence in this case reveals that, several days before the fire which claimed the life of Cynthia Collins, the defendant had been jilted by his girlfriend, Candy Barchett. During the course of his brief relationship with Barchett, the defendant had warned Barchett that he would kill any other man that she became involved with.

On June 29, 1986, the evening preceding the fire, the defendant, Candy Barchett and Ms. Barchett's new boyfriend, Mike Nichols, along with several other people, attended a gathering at the Old Farm Village Apartments, where both the defendant and Barchett resided. Ms. Barchett lived in Unit A of the complex directly above the apartment of Hope Collins.

At some point during the party, the defendant became angry and stated that Unit A would burn or would be blown up. One witness to the statement testified that the defendant was upset by Ms. Barchett's presence at the party with Nichols.

At approximately 3:30 A.M. on June 30, 1986, Hope Collins left the apartment complex with Dennis Smith and

Todd Ellerbrock. Hope Collins and Dennis Smith testified that the defendant agreed to babysit Cynthia Collins in her mother's absence. The defendant was the last person seen going toward the Collins' apartment before the fire.

The defendant was also the first person on the scene of the fire. The defendant attempted to enter the burning apartment and yelled that a child was inside the unit. Cynthia Collins was found, by firefighters, in the back bedroom of the apartment. She was dead on arrival at the hospital. The cause of the child's death was attributed to smoke inhalation.

In the early morning hours of June 30, 1986, the defendant broke into the K&J Greenhouse, located across the street from the apartment complex, and stole some plants. Although the owner of the greenhouse was uncertain as to whether any gasoline or paint thinner was removed from the greenhouse, the accelerants were on the premises at the time the defendant broke into the greenhouse.

That the fire was arson-related was supported by evidence of the burn patterns in the cement floor of the apartment, the presence of paint thinner in the wood porch of the apartment, and the presence of paint thinner and gasoline in the carpet from the apartment.

Having reviewed the entire record, we are convinced beyond a reasonable doubt that Cynthia Collins was killed while the defendant, being the principal offender, was committing, attempting to commit, or fleeing after committing aggravated arson.

The defendant next contends that the sentence of death was unreliable because of the trial court's consideration of a non-statutory aggravating circumstance in the penalty phase of the trial. The defendant also contends that the death sentence was inappropriate because of the existence of certain mitigating factors.

R.C. 2929.05(A) requires this court to determine whether the aggravating circumstances the defendant was found guilty of committing outweigh the mitigating factors beyond a reasonable doubt. Inasmuch as the defendant, by virtue of this assignment of error, has raised the issue of the existence of mitigating factors, we deem it appropriate at this juncture to conduct the independent review mandated by R.C. 2929.05(A).

However, we will first address the defendant's contention that the penalty imposed was unreliable because of the inclusion in the pre-sentence investigation report of excerpts from a letter authored by the defendant wherein he boasted of past crimes and threatened the lives of everyone involved in the present case. The defendant argues that this material was a non-statutory aggravating circumstance considered by the panel in sentencing him to death.

Again, we must indulge in the presumption that the three judge panel considered only the relevant, competent and material evidence in reaching its sentencing verdict. See, State v. Post, supra. We especially do so here in light of the fact that the panel had previously considered the material in question and suppressed it as being irrelevant to the guilt or penalty phases of the trial. We therefore reject the defendant's contention that the penalty was unreliable on this basis.

We now turn to our independent review to determine whether the single aggravating circumstance in this case outweighs the mitigating factors beyond a reasonable doubt.

R.C. 2929.04(B) sets forth the following factors to be considered in mitigation of the death penalty:

(1) Whether the victim of the offense induced or facilitated it;

(2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion or strong provocation;

(3) Whether at the time of committing the offense, the offender, because of mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.

(4) The youth of the offender;

(5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;

(6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;

(7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death."

The defendant presented three mitigating factors to the trial court, the diminished capacity provision, the youth of the offender provision and the catchall provision of R.C. 2929.04(B)(7), placing emphasis on the defendant's history and background, the existence of personality disorders and the defendant's efforts to rescue Cynthia Collins from the burning apartment.

Regarding the third factor, the defendant presented two psychologists, Drs. Leena Puhakka and William McIntosh as witnesses. The defendant also presented a psychiatrist, Dr. Antoine Demosthene, as a witness.

All three of these witnesses testified that the defendant suffers from borderline personality disorder and anti-social personality disorder, which are characterized, among other symptoms, by impulsive behavior. However, Dr. Puhakka testified that the defendant is capable of exerting a significant degree of control over his impulses. The witnesses agreed that neither personality disorder is a mental disease or defect.

Dr. Puhakka testified that a person with the defendant's personality disorders is capable of conforming to the requirements of the law. She also testified that the defendant, in this case, could appreciate the criminality of his conduct. Dr. Demosthene offered no opinion concerning the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.

Dr. McIntosh testified that the defendant suffered from diminished capacity to fully weigh the consequences of his conduct. However, he also stated that this aspect of the defendant's personality was indistinguishable from that of most felony offenders. Dr. McIntosh could not express an opinion as to whether the defendant could conform his conduct to the requirements of the law.

The state called Dr. Eugene Hepola, a psychologist and Dr. Thomas Sherman, a psychiatrist. Dr. Hepola testified that the defendant did not suffer from any mental disease or defect which would affect his capacity to conform to the requirements of the law. Dr. Sherman testified that the defendant suffered from borderline personality disorder but that there was no indication of his inability to understand the nature and criminality of an act or of his inability to refrain from doing an act.

Upon review of all the expert testimony offered as to the mental state of the defendant, we believe that the defendant did not lack substantial capacity to appreciate the criminality

of his conduct or to conform his conduct to the requirements of the law. Therefore, we find that the mitigating factor of R.C. 2929.04(B)(3) was not established.

Regarding the fourth factor, the defendant presented evidence that, although chronologically he was 21 years old when the crime was committed, mentally he functions on the level of a child or an adolescent. Dr. Puhakka testified that the defendant functions on the level of a ten year old child. However, the doctor also testified that a child of that age is capable of refraining from the defendant's conduct. Similarly, Dr. Demosthene testified that the defendant functions on the level of a fifteen to eighteen year old.

At the time the crime was committed, the defendant was beyond the age of majority. Upon review of the expert testimony, we conclude that there is no evidence that the defendant lacked the maturity to appreciate the consequences of his conduct. Therefore, we find that the mitigating circumstance of R.C. 2929.04(B)(4) was not established.

Regarding the seventh factor, the defendant presented his father, James Richey, as a witness. The focus of Mr. Richey's testimony concerned the defendant's childhood, adolescent and teen-age years.

The defendant grew up in Scotland, after his father, an American serviceman, married his mother, a native of Scotland. Both of the defendant's parents abused alcohol. In addition, the defendant's parents sometimes had physical altercations in his presence. The defendant's mother did not respect or trust authority figures such as law enforcement officers. She taught the defendant to distrust authority as well.

The defendant's adolescent years were marked by the commission of several juvenile offenses. The defendant's mother terminated efforts at psychological counseling for the defendant after his second juvenile offense.

In 1982, the defendant's family broke up and his father moved back to the United States. The defendant remained in Scotland with his mother, who forced the defendant out of her house in 1982, because of his involvement in other juvenile offenses. Subsequently, the defendant moved to the United States with his father.

The defendant and his father maintained a poor relationship. The primary cause for conflict in the relationship was the defendant's abuse of alcohol and drugs. Ultimately, the defendant's father forced him out of his house, which resulted in one of the defendant's several attempts to commit suicide. His father's subsequent efforts to have the defendant committed to a mental hospital were unsuccessful.

In addition to the foregoing testimony, the defendant presented the expert testimony that he suffers from personality disorders and that these disorders will improve through the natural aging process. The defendant also presented testimony that, despite his personality disorders, he would function well in a structured setting, such as prison.

The defendant also asked the trial court to consider, as a mitigating factor, evidence introduced at trial that, upon arriving at the scene of the fire, he attempted to enter the burning apartment to save the life of Cynthia Collins.

Upon our review of the totality of the evidence concerning the defendant's history and background, as testified to by his father, we find very little in his childhood, adolescent or teen-age experiences that justifies his conduct or lessens his moral culpability for the crime committed. The dynamics of the defendant's family life were not substantially different from the lives of millions of other people, who do not grow up to commit the capital offense of which the defendant has been found guilty. Therefore, we

will afford little weight to this evidence as a mitigating factor.

As regards the probability that the defendant's personality disorders will improve with age, and that he will function well in a prison setting despite the disorders, we find no evidence that the defendant's personality disorders were the cause of his criminal conduct. Therefore, the existence of the disorders or the defendant's potential for improvement do not lessen his moral culpability or diminish the appropriateness of the death penalty. We do not find this evidence to be a mitigating factor.

Likewise, we do not find that any attempt by the defendant to save the life of Cynthia Collins mitigates against the imposition of the death penalty. The defendant himself purposely placed the victim's life in jeopardy and we therefore do not find his subsequent effort to rescue her to be a mitigating factor.

When we place the aggravating circumstance, which was proved beyond a reasonable doubt, against the single mitigating factor regarding the defendant's background, we find that the mitigating factor is not sufficient to overcome the aggravating circumstance. Therefore, we find that the aggravating circumstance, of which the defendant was found guilty, outweighs the single mitigating factor found herein. The defendant's seventh assignment of error is not well taken.

8. "The death sentence in Appellant Richey's case was excessive and disproportionate, thereby resulting in the arbitrary and capricious imposition of the death penalty in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Section 9, Article I of the Ohio Constitution."

Pursuant to R.C. 2929.05(A), the scope of this court's review in determining whether the imposition of the death penalty is appropriate includes a determination as to whether the sentence is disproportionate to that imposed in similar cases. Before proceeding to a determination of proportionality, we will address the defendant's contention that this court, in conducting the proportionality review, should consider all similar Third Appellate District capital cases, including those cases where the death penalty was not imposed.

It is well settled that, for purposes of the proportionality review, we need only look to those capital cases within our geographical jurisdiction in which the death penalty was actually imposed. State v. Steffen (1987), 31 Ohio St. 3d 111, paragraph one of the syllabus. Therefore, we reject the defendant's argument.

This is only the second capital case considered by this court in which the death penalty was imposed. In State v. Spirko (March 6, 1989), Van Wert App. No. 15-84-22, unreported, we found the sentence of death to be appropriate in an aggravated murder case involving the kidnap and murder of an Elgin, Ohio postmistress.

The case sub judice is an aggravated murder-aggravated arson case wherein, the defendant, in the course of committing aggravated arson, caused the death of a defenseless, two year old child, whom he knew was alone and asleep in the apartment at the time he set the fire. Accordingly, we find the death penalty to be neither excessive nor disproportionate to the facts of this case.

The instant case, on its facts, is not similar to State v. Spirko, supra and therefore we are unable to draw any valid conclusions from a comparison of these cases. However, we can say that there is nothing in the Spirko case which would lead us to conclude that the sentence of death is either

excessive or inappropriate in this case. The defendant's eighth assignment of error is not well taken.

9. "The trial court's failure to consider appellant's mitigating evidence in its sentencing determination was contrary to R.C. 2929.04(B)(7), the Eighth and Fourteenth Amendments to the United States Constitution and Section 9, Article I, of the Ohio Constitution."

The defendant argues that the trial court erred in refusing to consider, as mitigating, certain evidence offered by the defendant in the penalty phase. The evidence which the defendant contends the trial court erroneously rejected was testimony by the defendant's father concerning his history and background, expert testimony concerning the potential for improvement in the defendant's behavior in a structured setting and material in the pre-sentence report concerning the defendant's history of suicide attempts and commitments to mental institutions.

In the separate opinion required by R.C. 2929.03(F), the trial court outlined in considerable detail the evidence which the defendant offered in mitigation. In arguing that the trial court erroneously discounted his mitigating evidence, the defendant cites the language from the court's opinion that "* * * the defendant produced no evidence that rose to the level of a mitigating factor."

In State v. Steffen, supra, at paragraph two of the syllabus, the Supreme Court of Ohio held that:

"While R.C. 2929.04(B)(7) evinces the legislature's intent that a defendant in a capital case be given wide latitude to introduce any evidence the defendant considers mitigating, this does not necessarily mean that the court is required to accept as mitigating everything offered by the defendant and admitted. The fact that an item of evidence is admissible

under R.C. 2929.04(B)(7) does not automatically mean that it must be given any weight."

Although the trial court is required to consider any evidence presented by the defendant pursuant to R.C. 2929.04(B), it is not required to find that such evidence actually constitutes a mitigating factor. See State v. Stumpf (1987), 32 Ohio St. 3d 95, certiorari denied (1988), U.S. , 108 S. Ct. 1060, rehearing denied (1988), U.S. , 108 S. Ct. 1492 and State v. Depew (1988), 38 Ohio St. 3d 275.

Obviously, the trial court, in the instant case, considered the evidence presented by the defendant but the court found either that the evidence did not mitigate against imposition of the death penalty or was of so little weight that it was outweighed by the aggravating circumstance. This was not error. Accordingly, the defendant's ninth assignment of error is not well taken.

A concomitant aspect of our review in death penalty cases is to determine "* * * whether the sentencing court properly weighed the aggravating circumstances the offender was found guilty of committing and the mitigating factors." R.C. 2929.05(A). Because the defendant, by virtue of this assignment of error, has raised the issue of the trial court's weighing analysis, we deem it appropriate at this juncture to make the determination required by R.C. 2929.05(A).

"The trial court, when it imposes a sentence of death, shall state in a separate opinion its specific findings as to the existence of any mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why these aggravating circumstances were sufficient to outweigh the mitigating factors." State v. Maurer (1984), 15 Ohio St. 3d 239, paragraph three of the syllabus, certiorari denied (1985), 472 U.S. 1012, rehearing denied (1985), 473 U.S. 924.

"Under R.C. 2929.03(F), a trial court or three judge panel may rely upon and cite the nature and circumstances of the offense as reasons supporting its finding that the aggravating circumstances were sufficient to outweigh the mitigating factors." State v. Stumpf, supra, paragraph one of the syllabus.

In its sentencing opinion, the trial court outlined in detail all of the evidence offered by the defendant in mitigation. The trial court stated that it considered all of the mitigating factors enumerated in R.C. 2929.04(B), but ultimately focused on factors (3) and (7). Apparently, the trial court found that there was no evidence to support factors (1), (2), (4), (5) and (6) as mitigating against imposition of the death penalty.

In considering the evidence offered in support of R.C. 2929.04(B)(3), the trial court found that there was no evidence that the defendant suffered from a mental disease or defect. The trial court, pursuant to R.C. 2929.04(B)(7), then stated that it had considered whether there was evidence of "any other factors that are relevant to the issue of whether the defendant should be sentenced to death."

The court, having detailed all of the evidence presented in mitigation, found that this evidence did not rise to the level of a mitigating factor and even if the evidence was sufficient to constitute mitigating factors, the aggravating circumstance outweighed any mitigating factors. Thus, it is apparent that the court afforded very little, if any, weight to the evidence offered under R.C. 2929.04(B)(7).

The three judge panel in stating its reasons why the aggravating circumstance outweighed any mitigating factors, cited the "cold, senseless and savage" nature of the defendant's offense. The court therefore found that the defendant's act lacked "even a hint of justification."

In reviewing the sentencing opinion, we find that, although the panel stated that the defendant was found guilty of aggravated murder and of the specification, the court did not specifically reiterate the specification as the aggravating circumstance. However, inasmuch as the failure of the trial court to comply with this aspect of R.C. 2929.03(F) does not go to the trial court's weighing analysis, or our review thereof, we find the error to be harmless. See, State v. Maurer, supra.

Having conducted the review required by R.C. 2929.05(A), we conclude that the trial court considered all of the evidence in mitigation and found that no mitigating factors existed or that the nature and circumstances of the aggravating circumstance substantially outweighed any mitigating effect of evidence presented pursuant to R.C. 2929.04(B)(7). We are therefore satisfied that the trial court properly weighed the aggravating circumstance the defendant was found guilty of committing and the mitigating factors.

10. "It was error to include in appellant's pre-sentence report material suppressed at trial as irrelevant to aggravation and mitigation, victim impact statements and unverified or inaccurate information. The report also introduced for the sentencer's consideration the non-statutory aggravating circumstance of appellant's future dangerousness. This deprived appellant of his right to a fair trial guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Section 16, Article I of the Ohio Constitution, and undermined the reliability in capital sentencing required by the Eighth and Fourteenth Amendments to the United States Constitution and Section 9, Article I, of the Ohio Constitution."

The defendant contends that the pre-sentence investigation report which was submitted to the three judge panel in the penalty phase was prejudicial for several reasons.

First, the defendant argues that excerpts from a letter authored by him and included in the report were irrelevant, inflammatory and injected into the penalty phase the non-statutory aggravating circumstance of the defendant's future dangerousness.

As we stated, infra, when we considered his issue under defendant's seventh assignment of error, we indulge in the presumption that the trial court considered only the relevant, competent and material evidence in arriving at its sentencing decision unless it affirmatively appears to the contrary. State v. Post, supra. The defendant has made no affirmative showing that the three judge panel considered this material.

Moreover, we believe that our indulgence in the presumption that the trial court did not consider the material in question is supported by the court's previous suppression of the material as irrelevant to either guilt or mitigation. We find that the defendant was not prejudiced by the inclusion of the material in the pre-sentence report.

The defendant next argues that he was prejudiced by the inclusion of victim impact statements in the pre-sentence report. The material complained of consists of statements as to the pecuniary loss incurred by the mother of the victim, Hope Collins, the owner of the Old Farm Village Apartments and the owner of the K&J Greenhouse.

Here, we refer to the following holding from State v. White (1968), 15 Ohio St. 2d 146, paragraph two of the syllabus:

"The use by the state of evidence of the victim's background, and reliance upon such evidence in its argument for the death penalty, is improper and constitutes error, but while such error may be cause for reversal because of its prejudicial effect on a jury, it must affirmatively appear that in a bench trial the court relied upon such testimony in

arriving at its verdict in order for such error to be ground for reversal."

More recently in State v. Post, supra, at page 384, the Supreme Court of Ohio held:

"Absent an indication that the panel was influenced by or considered the victim impact evidence in arriving at its decision, the admission of the victim impact statement * * * at the mitigation hearing did not constitute prejudicial error."

In the case at bar, there is nothing in the written opinion by the three judge panel to indicate that the court considered the pecuniary losses caused by the aggravated arson in its sentencing decision. Thus, we conclude that the inclusion of the material in the pre-sentence report does not constitute prejudicial error.

Finally, the defendant contends that he was prejudiced because the pre-sentence report was hastily prepared and not fully verified and therefore may have contained incorrect information.

Having read the report, it is apparent to this court that the information regarding the circumstances surrounding the offense committed is consistent with the record in the case. The remaining information is of a personal nature, from which the defendant, better than anyone else, should be able to identify any incorrect information that prejudiced him. The defendant has not done so.

The fact that the report may have been hastily prepared or not fully verified was not sufficiently grevious to taint the mitigation proceedings. See State v. Glenn (1986), 28 Ohio St. 3d 451, 459, certiorari denied (1987), U.S. , 107 S. Ct. 3219, rehearing denied (1987), U.S. , 108 S.Ct. 18. The defendant's tenth assignment of error is not well taken.

11. "The trial court erred by failing to state its essential factual findings on the record when it overruled appellant's motion to suppress as required by Criminal Rule 12(E), violating his rights as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and Sections 9 and 16, Article I, of the Ohio Constitution."

On December 12, 1986, a hearing was held on the defendant's motions to suppress all statements made by him to the police and other officials, and to suppress several letters authored by the defendant which had been confiscated during his incarceration for the instant offenses. On the day of the hearing, the trial court ruled from the bench and granted the motion to suppress the letters, but denied the motion to suppress the statements.

On January 6, 1987, the trial court filed its judgment entry journalizing its decision. The pertinent portion of the entry was as follows: "Motion to suppress statements is denied." The defendant contends that the trial court erred in failing to state, on the record, its essential findings of fact when overruling the motion to suppress, as required by Crim. R. 12(E).

"An appellate court need not consider an error which a party complaining of the trial court's judgment could have called, but did not call, to the trial court's attention at a time when such error could have been avoided or corrected by the trial court." State v. Williams (1977), 51 Ohio St. 2d 112, paragraph one of the syllabus.

Moreover, it is reversible error for the trial court to not make findings of fact on the record only in situations where it has been requested to do so. State v. Amalik (1986), 31 Ohio App. 3d 33. See also, Bryan v. Knapp (1986), 21 Ohio St. 3d 64.

In the instant case, after judgment was entered overruling the motion to suppress, any error in the court's failure to state

its essential findings could have been corrected upon the defendant's request for a statement of findings. However, the defendant made no request of the trial court. We therefore conclude that the trial court's failure to state its essential findings is not reversible error. Accord, State v. Holden (1985), 23 Ohio App. 3d 5, motion for leave to appeal overruled (June 9, 1985), No. 85-668. The defendant's eleventh assignment of error is not well taken.

12. "The trial court erred in denying appellant's motion to suppress statements. The statements were not obtained in accordance with the rules espoused in Miranda v. Arizona, and violated appellant's privilege against self-incrimination as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Section 10, Article I, of the Ohio Constitution."

The defendant cites several instances wherein he alleges that he made statements, pursuant to questioning by law enforcement officials, without the benefit of the warnings required under Miranda v. Arizona (1966), 384 U.S. 436.

The first statement was made to Thomas Miller, Chief of Police of Columbus Grove, Ohio, on June 30, 1986. Evidence introduced at the suppression hearing reveals that Chief Miller arrived at the scene of the fire at approximately 4:33 A.M. on June 30, 1986. Because the defendant had been interfering with the firefighters and other rescue operations, Chief Miller placed the defendant in the backseat of his patrol car.

After the fire had been brought under control, the police chief transported the defendant to the police station to begin the initial paperwork related to the fire. Miller testified that his sole reason for interviewing the defendant was because he was the first witness at the scene of the fire. Moreover, Chief Miller testified that the defendant was taken to the police

station simply because it was more convenient to interview the defendant at the station rather than in the police cruiser.

At the police station, Chief Miller did not give the defendant Miranda warnings prior to questioning. However, the defendant was advised, by the police chief, that he was not under arrest. At the suppression hearing, Chief Miller testified that the defendant was free to leave the police station at any time. Moreover, Miller testified that at the time he questioned the defendant, the fire was considered a "normal", non-arson related occurrence and the defendant was not under suspicion.

The procedural safeguards pertinent to the Miranda rule are not required in the absence of a custodial interrogation. Rhode Island v. Innis (1980), 446 U.S. 291. "Custodial interrogation" means questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. Oregon v. Mathiason (1977), 429 U.S. 492. A person is not "in custody" for purposes of receiving Miranda protection where there is no formal arrest or restraint of freedom of movement of the degree associated with formal arrest. Minnesota v. Murphy (1984), 465 U.S. 420.

Applying the foregoing authority to the facts of the instant case, we find that the defendant's statement to Chief Miller was not the product of a "custodial interrogation". At the time the defendant was questioned, he was not under formal arrest and was free to leave the station at will. The fact that the questioning took place at the police station did not require Chief Miller to administer Miranda warnings. Oregon v. Mathiason, supra; State v. Barnes (1986), 25 Ohio St. 3d 203, certiorari denied (1987), 480 U.S. 926.

The next statement, about which the defendant complains, was made to Roy Sargent, Deputy Sheriff of the

Putnam County Sheriff's Department. Deputy Sargent arrested the defendant for the instant offenses on July 1, 1986, at approximately 2:00 P.M. At the time of making the arrest, Sargent administered Miranda warnings to the defendant. Immediately after being arrested, the defendant was taken to the police station and was questioned by Sargent.

The defendant now argues that, because of the lapse in time, between the Miranda warnings given when he was arrested, and the subsequent questioning at the police station, the deputy was required to repeat the Miranda warnings prior to questioning him. We reject the defendant's argument and conclude that the brief passage of tame between arresting the defendant and transporting him to the Sheriff's office for questioning did not require that the Miranda warnings be given again. See United States ex rel. Patton v. Thieret (C.A.7, 1986), 791 F. 2d 543, certiorari denied (1986), 479 U.S. 888; United States ex rel. Henne v. Fike (C.A.7, 1977), 563 F.2d 809, certiorari denied (1978), 434 U.S. 1072.

The defendant next argues that statements which he made to Deputy Mike Ball on July 1, 1986 were obtained in violation of Miranda v. Arizona, supra. Testimony adduced at the suppression hearing reveals that, during the routine booking process, the defendant made spontaneous statements to Deputy Ball, which were not the result of questioning by Ball. Deputy Ball did not administer Miranda warnings to the defendant prior to booking him. However, the record is clear that, on the same day, prior to being booked, the defendant twice had been given Miranda warnings by other law enforcement officials connected with the case.

We find that the defendant's statements to Deputy Ball on July 1, 1986, were voluntary statements made during the normal and routine booking procedure. Hence, the statements were admissible as not being the product of custodial

interrogation. United States v. Menichino (C.A.5, 1974), 497 F.2d 935.

The defendant also objects to the introduction of a statement made to the prosecutor and deputy sheriffs subsequent to his incarceration. On July 3, 1986, the defendant was brought from his cell for questioning. Although, during the previous two days, the defendant twice had been warned of his rights under Miranda, no Miranda warnings were administered to the defendant on this occasion.

However, once interrogation of the defendant commenced, he immediately invoked his rights to remain silent and to speak with an attorney. At that point, questioning of the defendant ceased. The statement that the defendant now complains about is his one-line exclamation, "Go for it", which was made in response to the prosecutor's departing comment that he would see the defendant in court.

We believe that this single utterance by the defendant was a voluntary, nonincriminatory statement. Moreover, the statement was not the product of an "interrogation" by law enforcement officials, as that term has been defined by the Supreme Court of the United States. See Rhode Island v. Innis, supra at page 301. Therefore, introduction of the statement did not violate the defendant's privilege against self-incrimination.

Finally, the defendant objects to the introduction of three statements made to deputy sheriffs on July 2, 1986, August 17, 1986 and November 19, 1986. However, our review of the record reveals that all of the statements in question were the product of conversations initiated by the defendant with the deputies. These conversations, initiated by the defendant, under noncoercive circumstances and not during interrogation, were admissible even though the defendant

was not administered Miranda warnings. State v. Bryson (1970), 22 Ohio St. 2d 224, modified (1972), 408 U.S. 938.

For the foregoing reasons, we find that the trial court did not err in denying the defendant's motion to suppress the statements in question. The defendant's twelfth assignment of error is not well taken.

13. "The trial court's failure to sever count three of the indictment against Appellant Richey prejudiced his right to a fair trial guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Section 10, Article I of the Ohio Constitution, constituted an abuse of the trial court's discretion and requires reversal of appellant's conviction."

The defendant faced a five-count indictment. Count one contained the capital charge of aggravated murder with one specification. Count three charged the defendant with the breaking and entering of the K&J Greenhouse, located across the street from the Old Farm Village Apartment complex.

The defendant argues that he was prejudiced by the trial court's denial of his motion to sever Count three of the indictment because it permitted the trier of fact to improperly cumulate evidence of the aggravated murder charge and the breaking and entering charge. In essence, the defendant claims that he would not have been found guilty of the capital offense, if he had been tried separately on the breaking and entering charge.

Crim. R. 8(A) provides that two or more offenses may be charged in the same indictment if the offenses charged are "* * * based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or are part of a course of criminal conduct." In the instant case, joinder of Count one and Count three in the indictment was

proper as the offenses charged constituted part of a course of criminal conduct.

Crim. R. 14 provides for relief from prejudice which results from the joinder of offenses, even if that joinder is otherwise proper under Crim. R. 8(A). However, a defendant claiming error in the trial court's refusal to allow separate trials of multiple charges under Crim. R. 14 has the burden of affirmatively showing that his rights were prejudiced by the joinder. State v. Torres (1981), 66 Ohio St. 2d 340.

The defendant makes a general assertion that he was prejudiced by the trial court's cumulation of the evidence concerning Counts one and three. However, the defendant has not pointed to anything that affirmatively shows that the trial court improperly cumulated the evidence.

Given the fact that the evidence of the charges against the defendant was susceptible to easy segregation by the three judge panel, the fact that the defendant has not made an affirmative showing that the panel improperly cumulated the evidence and the fact that, even without a separate charge, evidence of the breaking and entering and resulting access of the defendant to the accelerants may well have been admissible to show "purpose" in the capital offense in any event, we must conclude that he was not prejudiced by the joinder of the offenses. See, State v. Torres, supra.

Moreover, in our opinion, even if Count three had been severed and all evidence thereof excluded, there still would have been sufficient evidence for the panel to find the defendant guilty of the capital offense beyond a reasonable doubt. The defendant's thirteenth assignment of error is not well taken.

14. "The unmistakable pattern of substantial misconduct during the closing argument of the guilt phase of appellant's trial induced the panel to convict and sentence to death

according to factors which were irrelevant and highly prejudicial. The misconduct violated appellant's constitutional rights to due process, equal protection, fair trial and against cruel and unusual punishment."[[[

The defendant cites several incidents that occurred during the prosecutor's closing argument which he regards as prosecutorial misconduct. Among those incidents were the prosecutor's references to the transcript of a tape-recorded statement given by the defendant when the transcript itself was not admitted into evidence; the prosecutor's characterization of the defendant and his conduct as being sociopathic and psychopathic when no evidence had been introduced during the guilt phase of the defendant's mental condition; explanatory statements regarding the lack of certain evidence surrounding the commission of the capital offense; and the prosecutor's recreation of the final hours of the victim's life.

We would note that the transcript to which the prosecutor referred was an accurate transcription of a tape-recorded statement. The transcript was not introduced, however the tape-recorded statement was admitted into evidence. We also note that similar explanatory comments regarding the evidence to which the defendant now alludes to as being prosecutorial misconduct, were also made by defense counsel in his closing argument.

Some latitude and freedom of expression are permitted for closing argument. See, State v. Apanovitch (1987), 33 Ohio St. 3d 19.

However, assuming the prosecution was more zealous than it should have been in its characterization of the defendant and in recreating the final hours of the victim's life, this is not grounds for reversal unless the conduct resulted in such prejudice to the defendant that it probably

adversely affected the outcome of his trial. The question is not whether statements were made that were unfair, but whether the defendant received an unfair verdict as a result of those comments. Id. at 24 (reaffirming its holding in State v. Maurer, supra that "[t]he conduct of a prosecuting attorney during trial cannot be made a ground of error unless the conduct deprives defendant of a fair trial."

In this case, there was sufficient evidence to convict the defendant even if the comments in question had not been made. Therefore, we find that even if some of the comments were inappropriate, they were not so prejudicial as to deny the defendant a fair trial. The defendant's fourteenth assignment of error is not well taken.

15. "The improper introduction of other acts evidence in the guilt phase of appellant's capital trial violated Evid. R. 404(B) and R.C. 2945.59. The misuse of this evidence deprived appellant of the reliability and fairness in a capital trial required by the Eighth, Sixth and Fourteenth Amendments to the United States Constitution and Sections 9, 10 and 16, Article I, of the Ohio Constitution."

The defendant argues that the introduction of testimony regarding his threats on the prosecutor's life and an attempt on the life of his own father was prejudicial error because the testimony was introduced to show that the defendant had a propensity for crime and that he therefore committed the capital crime with which he was charged.

Defense counsel failed to raise any objection during the trial to the foregoing testimony. Failure to object to an alleged error at the time of trial constitutes a waiver of the claim absent a showing of plain error. State v. Wade (1978), 53 Ohio St. 2d 182.

In State v. Long (1978), 53 Ohio St. 2d 91 at page 97, the Supreme Court of Ohio held:

"Notice of plain error under Crim. R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice."

We do not find the circumstances in the case at bar to be exceptional. The evidence came in through the testimony of deputy sheriffs during their recitation of conversations initiated by the defendant with the deputies while he was incarcerated. In addition to the testimony in question, the deputies also testified as to statements made by the defendant, during these conversations, which were clearly relevant to the case being tried.

Nor do we find that a manifest miscarriage of justice occurred as a result of the testimony in question. Thus, we find no plain error. The defendant's fifteenth assignment of error is not well taken.

16. "The trial court abused its discretion by denying defense counsel's motion to admonish and sequester witnesses. This denial deprived appellant of his right to a fair trial and the right to be free from the infliction of cruel and unusual punishment as required by the Fourteenth and Eighth Amendments respectively."

At the commencement of the guilt phase of the trial, the court ruled that there would be a separation of witnesses. Defense counsel then made an oral motion for the trial court to admonish each witness, after testifying, against discussing their testimony. In addition, defense counsel requested that the court order a sequestration of each witness away from the general public prior to testifying.

The trial court denied the motion. The defendant now contends that the trial court abused its discretion and also deprived him of a fair trial.

We do not find that the trial court abused its discretion in refusing to sequester the witnesses from the general public prior to testifying. It was within the province of cross-examination by defense counsel to elicit from witnesses the fact of whether they had discussed their testimony with other people prior to coming to court.

Similarly, any collusion among the witnesses themselves was also a matter which could also have been tested upon cross-examination. Evidence of collusion thus revealed would go to the credibility of the witnesses, which is a determination for the trier-of-fact.

Moreover, the defendant has only raised the possibility of collusion between witnesses as effecting his right to a fair trial. The defendant has not pointed to any specific instance of collusion that actually had a prejudicial effect on his right to a fair trial. Therefore, we conclude that the defendant was not prejudiced by the trial court's denial of the motion. The defendant's sixteenth assignment of error is not well taken.

17. "The state's failure to record the grand jury proceedings in Appellant Richey's case violated the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and Sections 9, 10 and 16, Article I, of the Ohio Constitution."

Crim. R. 22, which provides that "[i]n serious offense cases all proceedings shall be recorded", has been construed to apply to grand jury proceedings. See, State v. Grewell (1989), 45 Ohio St. 3d 4. Therefore, grand jury proceedings in felony cases must be recorded. Id. at 9. However, the failure to record grand jury proceedings does not constitute prejudicial error unless the defendant establishes a particularized need for disclosure of grand jury transcripts which outweighs the need to maintain grand jury secrecy. Id.

"Whether particularized need for disclosure of grand jury testimony is shown is a question of fact; but, generally, it is shown where from a consideration of all the surrounding circumstances it is probable that the failure to disclose the testimony will deprive the defendant of a fair adjudication * * *."

Grewell, supra at 9, citing State v. Greer (1981), 66 Ohio St. 2d 139, paragraph three of the syllabus.

The question of whether particularized need exists is within the discretion of the trial court. Greer, supra, at paragraph one of the syllabus. The issue cannot be raised on appeal absent a ruling by the trial court. Grewell, supra at 9.

In the trial court, the defendant moved to obtain disclosure of grand jury transcripts claiming a particularized need to avoid unnecessary death qualification voir dire in the event that the grand jury testimony did not present probable cause that the aggravating circumstances could be proven at trial. Without deciding the issue of whether the defendant had established a particularized need, the trial court denied the motion finding it to be moot because the grand jury testimony was not recorded.

Because the defendant subsequently waived his right to a jury trial, on appeal, he has apparently abandoned his claim of a particularized need to avoid unnecessary death qualification voir dire and now claims instead a need for the grand jury transcript to impeach the trial testimony of prosecution witnesses with their allegedly inconsistent grand jury testimony. However, the defendant failed at any time during the trial to assert the particularized need that he now claims. The defendant's omission deprived the trial court of the opportunity to issue a ruling on whether the defendant had established a particularized need for the grand jury testimony and thus whether his right to a fair adjudication

was prejudiced by the unavailability of a grand jury transcript.

Likewise, the defendant's failure to make any showing of particularized need, in the trial court, deprives this court of a record from which we can determine whether his right to a fair adjudication was prejudiced by prosecution witnesses' allegedly inconsistent testimony. The effect of defendant's omission is compounded by his failure to specifically identify anything in the record from which we can reasonably infer that the witnesses' testimony on direct examination was inconsistent with their grand jury testimony and that the defendant therefore was deprived of a fair adjudication.

Under these circumstances, we find that the defendant's failure to assert a particularized need to secure the grand jury testimony, during the trial, waives the issue on appeal. Accordingly, the seventeenth assignment of error is not well taken.

18. "The trial court erred in failing to keep a complete record of all proceedings throughout the guilt and mitigation phases of appellant's trial by allowing unrecorded sidebars, and by failing to have the view of the crime scene recorded. These failures violated appellant's rights as guaranteed by the Fourteenth Amendment to the United States Constitution, Section 10, Article I of the Ohio Constitution, and Section 2929.05 of the Ohio Revised Code."

The defendant first contends that the trial court erred to his prejudice by failing to record sidebar discussions. The defendant argues that the court's failure to record these discussions denies him effective appellate review.

The defendant's contention that, as a defendant in a capital case, he is constitutionally entitled to a "complete, full and unabridged transcript" is correct. State, ex rel. Spirko v. Court of Appeals (1986), 27 Ohio St. 3d 13, 18. However,

the defendant in Spirko, supra, had been denied access to entire transcripts of hearings, such as the arraignment and hearings on motions. Id. at 14. Here, the defendant was provided with a complete transcript of all the proceedings, which contains ten instances where the trial court conducted off-the-record discussions with both counsel.

In addressing a similar issue involving inaudible portions of a transcript in a capital case, the Supreme Court of Ohio in State v. DePew (1988), supra, at page 279, stated that "[t]o hold that appellant has therefore been denied his right to a complete transcript would be highly unjustified unless appellant has clearly demonstrated prejudice resulting from the missing portions."

In the instant case, the defendant does not point out a specific instance where effective appellate review is precluded by the incompleteness of the transcript. The defendant makes only the general assertion that he was deprived of a valuable source of information in pursuing appeals of his death sentence. Given the fact that the defendant has not demonstrated that he was prejudiced by the alleged inadequacy of the record, we conclude that the trial court's failure to record sidebar discussions is not reversible error.

The defendant next contends that he is also denied effective appellate review because the trial court's viewing of the crime scene was unrecorded.

The record is clear that the trial court made a specific inquiry of both counsel concerning any objection to leaving the recorder behind during the viewing of the crime scene. Defense counsel failed to register any objections.

Accordingly, we find no error in the failure of the trial court to record its viewing of the crime scene. The defendant's eighteenth assignment of error is not well taken.

19. "Appellant was denied the effective assistance of counsel in his capital trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Section 10, Article I, of the Ohio Constitution."

The defendant contends that his counsel's failure to object to the admission of certain evidence during trial, failure to request the trial court to state its essential findings on the record upon overruling defendant's motion to suppress and failure to recognize violations of Ohio's multiple counts statute resulted in him being denied effective assistance of counsel.

The Supreme Court of the United States, in Strickland v. Washington (1984), 466 U.S. 668, rehearing denied (1984), 467 U.S. 1267, held that a defendant is entitled to effective assistance of counsel under the Sixth Amendment, and set forth the test for determining whether a defendant has been denied that right:

"A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction of a death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." Id. at 687.

The Supreme Court of Ohio addressed the issue in State v. Hamblin (1988), 37 Ohio St. 3d 153, 156 as follows:

"In Ohio, a properly licensed attorney is presumed competent. The appellant bears the burden of proving that his

trial counsel was ineffective. To carry this burden, appellant must show that counsel failed to function as the 'counsel' guaranteed by the Sixth Amendment. Appellant must also demonstrate that the deficient performance prejudiced this defense. To establish prejudice, appellant must show that there is a reasonable probability that but for counsel's mistakes, the result of the trial would have been different. [Citations omitted.]"

In the case at bar, the defendant argues that evidence of his propensity for crime and future dangerousness was erroneously admitted in the guilt and penalty phases of the trial because his counsel failed to object. In addition, the defendant contends that, in the penalty phase, his counsel failed to object to the panel's consideration of a pre-sentence report that was not fully verified.

However, we are not convinced that the admission of evidence of the defendant's propensity for crime, in the guilt phase, resulted in the three judge panel reaching a verdict that it otherwise would not have reached. In fact, after examining all of the evidence, this court finds that the evidence not challenged by defense counsel, if excluded, would not have changed the result of the trial.

As to the defendant's assertion that the admission of evidence, in the penalty phase, concerning his future dangerousness resulted in his being denied effective assistance of counsel, we find no reasonable possibility that, but for the inclusion of the evidence, the outcome of the penalty phase would have been different. We must indulge in the presumption that the three judge panel considered only the competent, relevant and material evidence. State v. Post, supra. The defendant has made no affirmative showing that the trial court considered evidence of his future dangerousness in reaching its sentencing verdict and hence

he has not shown that he was prejudiced by counsel's failure to object to the material in question.

Furthermore, we are not convinced that defense counsel's failure to object to the three judge panel's consideration of the pre-sentence report, which was not fully verified, prejudiced the defendant in the penalty phase. The defendant makes a general assertion that he was prejudiced by the pre-sentence report. However, the defendant does not point to any specific error in the preparation of the report, which if corrected or excluded, through the efforts of defense counsel, would have changed the result of the trial.

The defendant also contends that his counsel's failure to request the trial court to state its essential findings on the record upon overruling the defendant's motion to suppress resulted in his being denied effective assistance of counsel. However, we do not find that, but for counsel's failure to make such a request, the result of the trial would have been different.

Finally, the defendant argues that he was denied effective assistance of counsel as a result of his counsel's failure to recognize violations of Ohio's multiple counts statute, R.C. 2941.25. However, we concluded under Assignment of Error Nos. 1 and 2 that, in this case, multiple sentencing was not precluded by R.C. 2941.25. There can be no claim of ineffective assistance of counsel for failure to object to a matter that is not error.

We are not persuaded that the defendant was denied effective assistance of counsel. The defendant's nineteenth assignment of error is not well taken.

20. "Ohio's mandatory sentencing scheme prevented the three judge panel from deciding whether death was the appropriate punishment in violation of appellant's rights as guaranteed by the Eighth and Fourteenth Amendments to the

United States Constitution and Sections 9 and 16, Article I of the Ohio Constitution."

This assignment of error was reviewed and rejected in State v. Coleman (1988), 37 Ohio St. 3d 286, certiorari denied (1988), U.S. , 109 S. Ct. 250 State v. Zuern (1987), 32 Ohio St. 3d 56, certiorari denied (1988), U.S. , 108 S.Ct. 786, rehearing denied (1988), U.S. , 108 S.Ct. 1252; State v. Buell (1986) 22 Ohio St. 3d 124, certiorari denied (1986), 479 U.S. 871, rehearing denied (1986), 479 U.S. 1000; and State v. Jenkins, supra. The defendant's twentieth assignment of error is not well taken.

21. "The trial court erred in imposing the death sentence on Appellant Richey. The Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Sections 2, 9, 10 and 16, Article I, Ohio Constitution, establish the requirements for a valid death penalty scheme. Ohio's statutory provisions governing the imposition of the death penalty, contained in 2903.01, 2929.02, 2929.021, 2929.022, 2929.023, 2929.03, 2929.04 and 2929.05 do not meet the prescribed requirements and, thus, are unconstitutional, both on their face and as applied to Kenneth Richey."

This argument was addressed and rejected in State v. Jenkins, supra; State v. Maurer, supra; State v. Martin (1985), 19 Ohio St. 3d 122, certiorari denied (1986), 474 U.S. 1073, rehearing denied (1986), 475 U.S. 1040; State v. Williams (1986), 23 Ohio St. 3d 16, certiorari denied (1987), 480 U.S. 923, rehearing denied (1987), U.S. , 107 S. Ct. 1966; State v. Glenn, supra; State v. Thompson (1987), 33 Ohio St. 3d 1; and State v. Coleman, supra. The defendant's twenty-first assignment of error is not well taken.

22. "Appellant's right to effective assistance of counsel was violated when the state called as a witness, during its case-in-chief, a defense retained expert."

Prior to trial, defense counsel retained Gregory DuBois, a consulting engineer with CTL Engineering, Inc. as an expert to investigate the origin of the fire which caused the death of Cynthia Collins. Mr. DuBois did not testify for the defense.

However, the defense-retained expert was called to the stand in the defendant's trial, as a witness for the prosecution, during the state's case-in-chief. DuBois testified that he was retained as an expert by the defense, that he had investigated the fire and that, after reviewing the evidence, he agreed that accelerants were used to start the fire.

The defendant now contends that the prosecution should not have been permitted to call DuBois to stand as part of the state's case-in-chief. The defendant argues that the state's use of a defense expert under these circumstances violated his right to effective assistance of counsel.

In support of his argument, the defendant relies heavily upon Hutchinson v. People (Sept. 8, 1987), Colo. Sup. Ct. No. 855C510, unreported, wherein the Colorado Supreme Court held that the prosecution's use of a defense-retained handwriting expert, in the state's case-in-chief against the defendant for forgery, violated the defendant's constitutional right to effective assistance of counsel.

We would first note that the authority relied upon by the defendant is not controlling. Moreover, we are not persuaded by the reasoning of the court in Hutchinson, supra. We would also note that, unlike the defendant in Hutchinson, supra, the defendant, in the case sub judice, did not object, at the time of trial, to the prosecution's use of the defense retained expert.

In State v. Noggle (Oct. 19, 1978), Crawford App. No. 3-89-2, unreported, affirmed sub. nom. Noggle v. Marshall (C.A.6, 1983), 706 F. 2d 1408 (1983) certiorari denied 464 U.S. 1010, this court addressed the issue of whether the prosecution's use of a defense retained psychiatrist, on

rebuttal, violated the defendant's right to effective assistance of counsel.

In State v. Noggle, supra, the defendant pled not guilty and not guilty by reason of insanity to aggravated murder. Counsel for the defense employed two psychiatrists to examine the defendant prior to trial. One psychiatrist was called for the defense, the other was not. After the defense rested, the state, as rebuttal, called the second psychiatrist, a Dr. Resnick, to testify for the state over objection by the defendant. Dr. Resnick testified in great detail as to what the defendant told him during the examination, including the defendant's confession that he stabbed the victim.

In addressing the right to effective assistance of counsel, under these facts, this court concluded:

"* * * [T]here should be, as an incident to the constitutional guarantee of effective counsel, a correlative ability to obtain psychiatric diagnosis and opinion without rendering the defendant's statements to the psychiatrist automatically available to the prosecution, and this requires a privilege arising from the attorney-client relationship protecting such interviews.

"* * *

"We would conclude that as a result of the constitutional guarantee of effective assistance of counsel there is a limited privilege for psychiatric experts retained by the defendant." State v. Noggle, supra, at page 24.

We see a clear distinction between the testimony of an expert witness concerning statements made to him by the defendant or defense counsel and the testimony of an expert witness regarding objectively observed facts.

In the instant case, the defense-retained expert was called by the state for the sole purpose of stating his opinion as to the cause of the fire. Mr. DuBois's opinion was based

entirely upon the reports of other witnesses, photographs of the scene of the fire and reports of the State Fire Marshall's Office. DuBois did not testify concerning any statements made to him by the defendant. Nor can it be said that any of his testimony was the result of communications between the defendant and his counsel. Moreover, there is no indication that Mr. DuBois ever consulted with the defendant.

On these facts, we are persuaded that there was no testimonial communication between the defendant and the witness which effected the defendant's right to effective assistance of counsel. The defendant's twenty-second assignment of error is not well taken.

Therefore, in accordance with foregoing dispositions of defendant's assignments of error, the judgment of the trial court is affirmed.

Judgment affirmed.

APPENDIX H

STATE OF OHIO,

PLAINTIFF-APPELLEE,

v.

KENNETH RICHEY,

DEFENDANT-APPELLANT

Case No. 12-87-2

Court of Appeals of Ohio,
Third Appellate District,
Putnam County

December 28, 1989, Decided

MR. RANDALL M. DANA, Ohio Public Defender, MS. JANE PERRY, Ohio Public Defender Commission, Columbus, Ohio, For Appellant.

MR. DANIEL R. GERSCHUTZ, Prosecuting Attorney, Ottawa, Ohio, For Appellee.

SHAW, J., EVANS, P.J. and BRYANT, J., concur.

OPINION

SHAW, J. In addition to our opinion on the twenty-two assignments of error briefed and argued by the defendant in this case, we are also required by R.C. 2929.05(A) to file a separate opinion stating our findings as to whether the

aggravating circumstance the defendant was found guilty of committing outweighs the mitigating factors in this case, whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, whether the evidence supports the finding of the aggravating circumstance and whether the sentencing court properly weighed the aggravating circumstance and mitigating factors.

In his Assignment of Error Nos. 7, 8 and 9, the defendant raised issues pertinent to the foregoing determination. Consequently, in addition to addressing the arguments raised by the defendant, under these assignments of error, we also made the detailed findings required by R.C. 2929.05(A). Therefore, in this separate opinion, we will summarize our findings.

In this case, the defendant was charged with one aggravating circumstance, to wit: that he purposely caused the death of Cynthia Collins while committing, attempting to commit, or fleeing immediately after committing aggravated arson in violation of R.C. 2929.02(A)(1).

Under Assignment of Error No. 7, we stated in considerable detail the evidence that supports the finding of the aggravating circumstance. We reaffirm our conclusion that the evidence in the record supports the finding that the defendant ignited a fire in or around the apartment of Hope Collins with full knowledge that Cynthia Collins was alone and asleep in the apartment. We are convinced beyond a reasonable doubt that Cynthia Collins was killed while the defendant was committing aggravated arson.

The defendant presented evidence of three mitigating factors, the diminished capacity provision of R.C. 2929.04(B)(3), the youth of the offender provision of R.C. 2929.04(B)(4) and the catchall provision of R.C. 2929.04(B)(7), placing emphasis on the defendant's history and background, the existence of personality disorders and

the defendant's efforts to rescue Cynthia Collins from the burning apartment.

Under Assignment of Error No. 7, we detailed the evidence presented by the defendant in mitigation against imposition of the death penalty.

We found that the mitigating factors of R.C. 2929.04(B)(3) and (4) were not established. The defendant did not lack substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. The defendant was 21 years old at the time the crime was committed and did not lack the maturity to appreciate the consequences of his conduct.

Regarding evidence of mitigating factors under R.C. 2929.04(B)(7), we did not find the existence of the defendant's personality disorders and his potential for improvement to be a mitigating factor. There was no evidence that the defendant's personality disorders were the cause of his criminal conduct. Therefore the existence of the disorders of the defendant's potential for improvement do not lessen his moral culpability or diminish the appropriateness of the death penalty.

Likewise, we did not find that any attempt by the defendant to rescue Cynthia Collins mitigates against imposition of the death penalty. The defendant himself purposely placed the victim's life in jeopardy and we therefore did not find his subsequent effort to rescue her to be a mitigating factor.

Finally, as regards the evidence concerning the defendant's history and background, we found little in the defendant's experiences that justified his conduct or lessened his moral culpability for the crime committed. The dynamics of the defendant's family life were not substantially different from the lives of millions of other people who do not grow up to commit the capital offense of which the defendant has

been found guilty. Therefore, we afforded little weight to this evidence as a mitigating factor.

When we placed the aggravating circumstance, which was proved beyond a reasonable doubt, against the single mitigating factor regarding the defendant's background, we found that the mitigating factor was outweighed by the aggravating circumstance. We therefore reaffirm our conclusion that the aggravating circumstance, of which the defendant was found guilty, outweighs the single mitigating factor established.

Under Assignment of Error No. 9, we determined that the sentencing court properly weighed the aggravating circumstance and mitigating factors. The three judge panel considered the evidence in mitigation, and the nature and circumstances of the offense in concluding that the single aggravating circumstance outweighed any evidence which arguably could be considered as a mitigating factor. We found nothing improper in the analysis and therefore reaffirm our conclusion that the sentencing court properly weighed the aggravating circumstance and mitigating factors.

This is only the second capital case considered by this court in which the death penalty was imposed. The first death penalty case that we considered, and in which we found the sentence of death to be appropriate, was an aggravated murder-kidnap case. See State v. Spirko (March 6, 1989), Van Wert App. No. 15-84-22, unreported. Consequently, we have no valid precedent to use in determining whether the sentence in this case, involving aggravated murder-aggravated arson, is disproportionate. However, as we noted in our disposition of Assignment of Error No. 8, nothing in the Spirko case would lead us to conclude that the sentence in this case is excessive or inappropriate.

Accordingly, we do not hesitate to reaffirm out conclusion, reached under Assignment of Error No. 8, that the sentence of death is appropriate in this case.

We affirm the sentence of death imposed by the trial court.

Sentence of death affirmed.

APPENDIX I

THE STATE OF OHIO,
APPELLEE,

v.

RICHEY,
APPELLANT.

No. 95-374

SUPREME COURT OF OHIO

73 Ohio St. 3d 523; 653 N.E.2d 344

June 21, 1995, Submitted
August 30, 1995, Decided

Appeal from the Court of Appeals for Putnam County, No. 12-87-2.

Appellant, Kenneth T. Richey, was convicted of aggravated murder, aggravated arson, breaking and entering, and child endangering, and sentenced to death in 1987. The court of appeals affirmed the convictions and sentence. *State v. Richey* (Dec. 28, 1989), Putnam App. No. 12-87-2, unreported, 1989 WL 156561. On direct appeal as of right, we also affirmed. *State v. Richey* (1992), 64 Ohio St.3d 353, 595 N.E.2d 915, certiorari denied, *Richey v. Ohio* (1993), 507 U.S. , 113 S.Ct. 1592, 123 L.Ed.2d 157.

In April 1994, Richey filed with the court of appeals an application to reopen his appeal under App.R. 26(B), alleging ineffective assistance of his appellate counsel. The court of appeals denied the application, finding that appellant had

failed to establish good cause for not filing the application to reopen within ninety days from the journalization of the appellate judgment, as required by App.R. 26(B)(1) and (B)(2)(b). The court of appeals also held that appellant's twenty-two proposed assignments of error failed to raise any genuine issue as to whether appellant was deprived of the effective assistance of counsel on appeal.

Appellant appeals the denial to this court. Appellant also now submits propositions of law XXIII through XXV, asserting he was denied the effective assistance of appellate counsel in his appeal before this court.

Daniel R. Gerschutz, Putnam County Prosecuting Attorney, for appellee.

Goodwin, Procter & Hoar, Paul E. Nemser (admitted *pro hac vice*), *Kenneth J. Parsigian* (admitted *pro hac vice*), *Patricia A. Lipoma* and *Lisa M. Tittemore; Porter, Wright, Morris & Arthur* and *Scott E. North*, for appellant.

Moyer, C.J., Douglas, Resnick, F.E. Sweeney, Pfeifer and Cook, JJ., concur. Wright, J., dissents.

Per curiam. We affirm the decision of the court of appeals for the reasons stated in its opinion. Further, we reject appellant's additional propositions of law XXIII through XXV, asserting appellant was denied the effective assistance of counsel before this court in his application for rehearing. Appellant's 1992 appeal to this court was not a first appeal as of right; therefore, he had no constitutional right to counsel, and hence no constitutional right to effective assistance of counsel. See *State v. Buell* (1994), 70 Ohio St.3d 1211, 639 N.E.2d 110.

Judgment affirmed.

Moyer, C.J., Douglas, Resnick, F.E. Sweeney, Pfeifer and Cook, JJ., concur.

Wright, J., dissents.

Wright, J., dissenting.

I dissent for several reasons, most of which are included within Justice Herbert R. Brown's dissent in *State v. Richey* (1992), 64 Ohio St.3d 353, 373, 595 N.E.2d 915, 931.

APPENDIX J

THE COURT OF APPEALS
OF THE THIRD APPELLATE
JUDICIAL DISTRICT OF OHIO
PUTNAM COUNTY

STATE OF OHIO

PLAINTIFF-APPELLEE CASE NO. 12-87-2

v.

KENNETH T. REICHEY JOURNAL ENTRY

DEFENDANT-APPELLANT

This cause comes before the court upon the application of defendant, Kenneth T. Richey, for reopening pursuant to App.R. 26(B) and *State v. Murnahan* (1992), 63 Ohio St.3d. 60, the memorandum in opposition filed by the State of Ohio and defendant's "notice of supplemental authority."

Defendant's conviction and death sentence were affirmed by opinion and journal entry of this court on December 28, 1989, and by the Ohio Supreme Court on August 12, 1992. See *State v. Richey* (1992), 64 Ohio St.3d 353. Defendant's application for reopening was filed April 15, 1994.

The court finds that defendant's application was not fled within ninety days of the journalization of the appellate judgment as required by App.R. 26(B)(1). The court further finds that defendant's explanation for the delay, that he was represented by the same appellate counsel for the past four years, fails to show good cause for the application being flied

untimely. App.R. 26(B)(l) and 26(B)(2)(b). See, also, *State v. Carter* (1994), 70 Ohio St. 3d 642.

The court further finds that, notwithstanding the fatal procedural defect, the twenty-two assignments of error raised by defendant in his application for reopening fail to raise any genuine issue as to whether defendant was deprived of the effective assistance of counsel on appeal. *Strickland v. Washington* (1984), 466 U.S. 668; App.R. 26(B)(5).

In support of his application, defendant presents affidavits of his prior appellate counsel, Ken Murray and Jane P. Perry, stating that they "did not think of" and "completely missed" the issues raised in the application's assignments of error one through fourteen and, though they raised the claim of ineffective assistance of trial counsel, through "oversight" they missed the particular deficiencies of trial counsel alleged in the application's assignment of errors fifteen and sixteen. The Supreme Court of the United States has long recognized that the Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim. *Engle v. Isaac* (1982), 456 U.S. 107, 102.

Upon our review of the first sixteen assignments of error the court finds that several of the issues were waived at trial, some were precluded by settled law and several are merely restatements of issues addressed by this court and the supreme court on appeal. Clearly, without the benefit of hindsight, counsel could have reasonably decided that they could not add these issues without "burying good arguments *** in a verbal mound made up of strong and weak contentions." See *State v. Campbell* (1994), 69 Ohio St.3d 38, 53, citing *Jones v. Barnes* (1983), 463 U.S. 745, 753.

In regard to assignments of error seventeen through twenty-one of defendant's application, defendant admits that his appellate counsel addressed these issues in the direct appeal, but claims they did so on the basis of an "insufficient and/or incomplete record." Upon our review of the record

and these assignments of error, the court finds no indication that an "insufficient and/or incomplete record" limited the argument or consideration given these issues in the direct appeal.

Finally, defendant asserts by his twenty-second assignment of error that his prior appellate counsel's ability to provide effective representation was undermined by a conflict of interest. By affidavit, Mr. Murray states that he deliberately presented the ineffective assistance of trial counsel claim "in a relatively weak fashion" because his superior at the Ohio Public Defender Commission told him not to raise the ineffective assistance claim. However, due to his resignation from the Public Defender Commission, Mr. Murray was not involved with defendant's appeal after his work on the merit brief. Ms. Perry states in her affidavit that she had no knowledge of the alleged conflict of interest and the record shows that she continued as counsel for the defense in this court and the Ohio Supreme Court.

Upon our review of the record, the court finds nothing to corroborate the allegation that a "conflict of interest" undermined the representation provided defendant in his appeal to this court. Furthermore, in regard to this assignment and all others which rely on the affidavits of Mr. Murray and Ms. Perry, the court finds that the unsubstantiated, self-serving allegations of appellate counsels' own ineffectiveness, without corroborating circumstances in the record, are insufficient to show a genuine issue as to whether defendant was deprived of the effective assistance of counsel on appeal. App.R. 26(B)(5). To find otherwise would, in essence, license a conceivably deliberate and unethical strategy.

Accordingly, for the reasons set forth above, the court finds that defendant's application for reopening is not well taken and should be denied.

It is therefore ORDERED, ADJUDGED and DECREED that defendant's application for reopening be, and the same hereby is, denied.

/s/ Stephen R. Shaw
/s/ Thomas F. Bryant
/s/ John R. Evans
JUDGES

DATED: January 4, 1995

APPENDIX K

State v. Richey.

97-2728.

SUPREME COURT OF OHIO

81 Ohio St. 3d 1467; 690 N.E.2d 1287

March 11, 1998, Decided

DISMISSAL, SUA SPONTE, NO SUBSTANTIAL CONSTITUTIONAL QUESTION AND DISCRETIONARY APPEAL, IF APPLICABLE, NOT ALLOWED
Moyer, C.J., dissents.

APPENDIX L

STATE OF OHIO,
PLAINTIFF-APPELLEE

v.

KENNETH T. RICHEY,
DEFENDANT-APPELLANT

CASE NO. 12-97-7

COURT OF APPEALS OF OHIO,
THIRD APPELLATE DISTRICT,
PUTNAM COUNTY

November 18, 1997, Date of
Judgment Entry

MR. PAUL E. NEMSER, MR. KENNETH J. PARSIGIAN, Attorneys at Law, GOODWIN, PROCTER & HOAR LLP, Boston, MA, MR. SCOTT E. NORTH, Attorney at Law, Columbus, Ohio, For Appellant.

MR. DANIEL R. GERSCHUTZ, Prosecuting Attorney, Ottawa, Ohio, MR. MICHAEL L. COLLYER, Special Assistant Prosecutor, Cleveland, Ohio, For Appellee.

EVANS, P.J. SHAW and BRYANT, JJ., concur.

OPINION

EVANS, P.J. This is an appeal by the petitioner, Kenneth Richey ("Appellant"), from a judgment of the Court of Common Pleas of Putnam County denying his petition for

post conviction relief from judgment without holding an evidentiary hearing.

In January 1987, a three-judge panel convicted Appellant of aggravated murder, aggravated arson, breaking and entering, and child endangerment for the deliberate setting of an apartment fire which resulted in the death of three year old Cynthia Collins. Appellant was sentenced to death on the aggravated murder conviction. He appealed his conviction and sentence to this court, which affirmed the conviction and sentence. This decision was affirmed by the Ohio Supreme Court, see *State v. Richey* (1992), 64 Ohio St. 3d 353, 595 N.E.2d 915, and the United States Supreme Court denied his petition for a writ of certiorari. After having his applications for reopening denied in all three courts, on May 2, 1996, Appellant filed his petition for post-conviction relief, with supporting affidavits, in the court of common pleas. The court denied the petition on March 26, 1997 without an evidentiary hearing and pursuant to the state's motion for summary judgment. On May 14, 1997, the trial court entered its findings of fact and conclusions of law, following which Appellant filed his timely notice of appeal to this court. He has asserted four assignments of error.

FIRST ASSIGNMENT OF ERROR

The trial court erred when it held that Richey's claim of actual innocence--based on new evidence of false scientific testimony--was not cognizable.

During the guilt phase of Appellant's trial the state introduced expert testimony that their tests had shown the presence of accelerants in the items removed from the burned apartment. Along with his petition, Appellant submitted affidavits of various experts who have concluded from their review of the state's testing results that the state's witnesses were incompetent and that the tests failed to establish the presence of accelerants in the materials tested. Therefore,

Appellant asserts that the fire was just as likely to have been caused by accident as by arson. Appellant argues that this "newly discovered evidence" is proof of his innocence. Because execution of an innocent person violates the Constitution, Appellant thus argues that his claim of "actual innocence" is a matter of constitutional proportion which entitles him to raise this issue in a petition for post-conviction relief. However, we find that Appellant's claim of actual innocence is not established by the "newly discovered evidence" offered in support of the claim.

We agree with Appellant that a claim of actual innocence is cognizable in a petition for post conviction relief as a claim of constitutional proportion. As Appellant asserts, execution of an innocent person is clearly not defensible under the Constitution. However, Appellant does not establish a claim of actual innocence based upon his so-called "newly discovered evidence." Even if the trial experts' analyses of the available data were erroneous, such error does not destroy the state's case against Appellant. Furthermore, the "newly discovered evidence" presented by Appellant does not by itself establish his actual innocence. The mere absence of accelerants in the articles tested is not conclusive proof that Appellant is innocent of the crime of arson. There is other evidence in the record which supports the verdict of the jury. Thus, we conclude that Appellant does not present a claim of actual innocence.

We find, therefore, that the trial court did not err in denying a hearing on Appellant's petition for the purpose of introducing "newly discovered evidence" which proved his innocence. The first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

The trial court erred in holding that Richey's claims are procedurally barred by *res judicata* and because he "amended" his petition without leave.

The trial court found in its decision overruling Appellant's petition that because Appellant first introduced and argued his claim of "actual innocence" in his memorandum in opposition to the state's motion for summary judgment, that claim was barred under R.C. 2953.21(F). That section provides that a petitioner may amend his petition at any time after the state has responded to the petition, but only after obtaining leave of court. Appellant argues that this action by the court was error, because his claim of innocence was not newly introduced at that time, but was presented in the original petition, albeit not in that exact terminology.

We agree with Appellant that this was the action taken by the trial court. We also find that, as Appellant argues, he did not "amend" his petition by his response to the state's motion for summary judgment. Nevertheless, although the trial court was mistaken on this issue, the second assignment of error is not well taken, as the issues raised are *res judicata* under *State v. Perry*.

The doctrine of *res judicata* has been consistently applied to petitions seeking post-conviction relief. Only if the issues raised in the petition must be addressed by reference to evidence *dehors* the record is the court required to hold a hearing and permit the parties to present new evidence. See R.C. 2953.21(E). Moreover, newly presented evidence "must not be evidence which was in existence and available for use at the time of trial and which could and should have been submitted at trial if the petitioner wished to make use of it." *State v. Hawkins*, 1996 Ohio App. LEXIS 2631 (June 26, 1996), Hamilton App. No. C-950130, 1996 WL 348024, unreported. See *State v. Perry* (1967), 10 Ohio St. 2d 175, 226 N.E.2d 104, paragraph nine of the syllabus.

There is nothing in the record of this case to demonstrate that Appellant could not have sought and presented

testimony of an expert who disagreed with the conclusions of the state's expert witnesses during Appellant's trial. A review by a second expert of an expert's analysis of scientific data presented at trial is not "new evidence." According to Appellant's "newly discovered" expert analyst, the techniques he used for analyzing the data were available at the time of Appellant's trial. Furthermore, the fact that Appellant's newly discovered witnesses disagree with the expert testimony elicited at the trial does not render those experts "incompetent," as alleged by Appellant, nor is incompetency of an expert in and of itself a basis for reversal of a conviction. Rather, the credibility of a witness is an issue for the fact finder at trial. Moreover, the trial record demonstrates that Appellant's defense counsel did introduce evidence to contradict and cast doubt upon the trial witnesses' testimony, including that of the experts called, and upon the reliability of the scientific analyses presented at trial. The record is replete with circumstantial evidence of Appellant's participation in arson the night of the fire in addition to the analysis of the carpet and wood samples. This evidence was presented by a multitude of witnesses to Appellant's behavior the night of the fire, prior to that night, and following the actual event. The second assignment of error is overruled.

THIRD ASSIGNMENT OF ERROR

The trial court erred by holding that Richey failed to present sufficient *prima facie* evidence of ineffective assistance of counsel to warrant an evidentiary hearing.

Appellant claims that his trial counsel's failure to search for and find a scientific expert who would support his position at trial constituted ineffective assistance of counsel. However, as we noted, *supra*, pursuant to *State v. Perry*, this is a claim which was or could have been raised upon direct appeal from the conviction in this case because the fact that

defense counsel failed to call an expert to dispute the state's experts is demonstrated on the trial record. Therefore, we find that this claim is *res judicata*.

Moreover, the failure of counsel to raise alleged errors in the direct appeal of a trial (thus causing them to be considered *res judicata* during post-conviction relief [under] *State v. Perry* (1967), 10 Ohio St. 2d 175, 226 N.E.2d 104), does not give rise to a meritorious claim of ineffective assistance of counsel when petitioner would not have prevailed upon consideration of the errors had they been actually raised. *State v. Benner* (1988), 40 Ohio St. 3d 301, 315, 533 N.E.2d 701. *State v. Glenn* (Sept. 21, 1990), Portage App. No. 89- P-2090, 1990 WL 136629, unreported. As we stated, Appellant's claim that his constitutional right to a fair trial was violated due to counsel's failure to find an expert who could testify favorably does not render his representation ineffective under *Strickland v. Washington* (1984), 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052. Whether another expert would have testified such that the results of Appellant's trial would have been different is pure speculation. Additionally, the record does not support Appellant's claim that trial counsel failed to elicit and offer at trial certain mitigating and exculpatory evidence. A review of the record establishes that there was an abundance of such evidence offered. The third assignment of error is overruled.

FOURTH ASSIGNMENT OF ERROR

The trial court erred in relying on its own personal knowledge in ruling on the Petition.

Appellant contends that the trial judge erroneously relied solely on his own recollection of the events at the sentencing hearing, in that the trial court erroneously considered an incriminating letter written by Appellant while he was in jail pending trial. The basis for Appellant's complaint is that,

despite the introduction of only excerpts of the letter into evidence at trial, the trial judge noted in his decision dismissing Appellant's petition for post conviction relief that the entire letter was before the court when it was originally ruled upon. However, as the court held, there is simply no evidence that the sentencing judges considered anything but the "relevant, competent, and material evidence in arriving at [their] sentencing decision." Following our review of the record, we concur in that conclusion. Further, there is no evidence that the judge, in deciding the issues presented in the post-conviction petition, relied on his "memory," or upon anything but the evidence permitted by R.C. 2953.21(C), which includes affidavits, and the documentary evidence, all the files and records pertaining to the proceedings against the petitioner, including, but not limited to, the indictment, the court's journal entries, the journalized records of the clerk of the court, and the court reporter's transcript.

Therefore, the fourth assignment of error is overruled.

Having found no error prejudicial to the appellant herein, in any of the particulars assigned and argued, we affirm the judgment of the trial court.

Judgment affirmed.

SHAW and BRYANT, JJ., concur.

APPENDIX M

IN THE COURT OF COMMON PLEAS
PUTNAM COUNTY, OHIO

STATE OF OHIO,	:	CASE NO. CR86-21
	:	
Plaintiff/Respondent	:	JUDGE MICHAEL J.
v	:	CORRIGAN
	:	
KENNETH T. RICHEY	:	FINDINGS OF FACT,
	:	CONCLUSIONS OF LAW,
Defendant/Petitioner.	:	ENTRY DENYING PET-
	:	ITION TO VACATE OR
	:	SET ASIDE SENTENCE
	:	WITHOUT A HEARING

This matter came before the Court on the Petition to Vacate or Set Aside Sentence with exhibits filed by Petitioner Kenneth Richey, Richey's amended petition filed the day after, the Motion for Ruling Under R.C. 2953.21(C) and/or Motion for Summary Judgment Under R.C. 2953.21(D) filed by Respondent, and Petitioner's Memorandum In Opposition to the State's motion. The Court considered the entire record in case CR86-21, including, but not limited to dockets, records, transcripts of proceedings, trial exhibits and journal entries; the records from the direct appeal in the Third District Court of Appeals in case no. 12-87-2, and the direct appeal to the Supreme Court of Ohio in case no. 90-338, reported at 64 Ohio St.3d 353, decided August 12, 1992. This Court has also considered the arguments made by the parties at a hearing held on March 21, 1997. Based upon all of the above, the Court makes the following findings of fact applicable to all causes of action.

(1) The grand jury of Putnam County, Ohio returned indictment CR86-21, charging Richey with the Aggravated Murder of Cynthia Collins with a death penalty specification under R.C. 2929.04(A)(7). The indictment also charged Richey with one count of aggravated arson, one count of breaking and entering, one count of involuntary manslaughter, and one count of child endangerment.
Indictment CR86-21 was returned on July 10, 1986.

(2) On January 8, 1987, a three judge panel comprised of the Honorable Michael J. Corrigan, the Honorable Donald C. Nugent, and the Honorable Charles D. Abood, found Richey guilty of aggravated murder with the death penalty specification, guilty of aggravated arson, guilty of breaking and entering, and guilty of child endangerment. The count of involuntary manslaughter was dismissed as a lesser-included offense of aggravated murder.

(3) On January 26, 1987, following the presentation of mitigation, the three judge panel imposed the death penalty upon Richey.

(4) The Third District Court of Appeals affirmed the judgment and sentence on December 28, 1989 in case no. 12-87-2.

(5) The Ohio Supreme Court affirmed the judgment and sentence on August12, 1992.

(6) The United States Supreme Court denied certiorari on March 22, 1993.

(7) Richey filed an application for reopening In the Third District Court of Appeals on April 5, 1994.

(8) On January 4, 1995, the Third District Court of Appeals denied Richey's Application for Reopening.

(9) The Ohio Supreme Court affirmed the decision of the Court of Appeals denying the application for reopening on August 30, 1995. The United States Supreme Court denied certiorari on April 1, 1995.

(10) On May 2, 1996, Richey filed a petition to vacate or set aside sentence with attached exhibits.

(11) On May 3, 1996, Richey filed an amended petition to vacate or set aside sentence.

(12) On July 2, 1996, the State of Ohio filed a Motion for Ruling under R.C. 2953.21(C) and/or Motion for Summary Judgment under R.C. 2953.21(D).

(13) On September 3, 1996, Richey filed a Memorandum in Opposition to the State's Motion for Ruling under R.C. 2953.21(C) and/or Motion for Summary Judgment under R.C. 2953.21(D).

FIRST CAUSE OF ACTION

The Court makes the following findings of fact for the first cause of action.

(1) This cause of action alleges that the State's experts used unsound scientific principles, which caused them to give false testimony.

(2) Richey does not allege that the prosecutor was aware that the scientific principles used by the State's experts were allegedly unsound.

(3) Richey does not allege that the State's experts

knowingly or purposely lied.

(4) The trial transcript in this case reflects the methodology and scientific principles used by the experts to arrive at their conclusions.

(5) The claims In this cause of action could have been raised at trial.

(6) Nowhere in Richey's Petition to Vacate or Set Aside Sentence does he mention the phrase "actual innocence.", nor Schlup v. Delo (1995), 115 S.Ct. 851, nor Herrera v. Collins (1993), 506 U.S. 390.

(7) In Richey's Memorandum in Opposition to the State's Motion for Ruling under R.C. 2953.21(C) and/or Motion for Summary Judgment under R.C. 2953.21(D), Richey for the first time argued that his first cause of action includes a constitutional claim of actual innocence.

(8) R.C. 2953.21(F) requires the petitioner to secure leave of court to amend his petition after the prosecutor has responded to the post-conviction petition.

(9) Richey did not seek leave of court to amend his petition.

Based upon the above findings of fact, the Court makes the following conclusions of law:

(1) As Richey's claim is based upon facts appearing in the record, this claim could have been raised at Richey's trial, and it is therefore now *res judicata.* State v. Perry (1967), 10 Ohio St.2d 175, paragraph nine of the syllabus.

(2) Even if this Court could consider the claim, it is not one cognizable in post-conviction litigation because Richey does not claim that the State was aware of its alleged falsity nor does Richey allege that the experts knowingly or purposely bled. State v. Cook (Dec. 29, 1995), Hamilton App. No. C-950090, unreported (collecting cases).

(3) As Richey failed to secure leave of court before attempting to "amend" his petition to include a claim of actual innocence, that claim is not properly before this Court.

(4) Even if the claim were before this Court, it is not cognizable. State v. Lott (Nov. 3, 1994), Cuyahoga App. Nos. 66388, 66389, and 66390, unreported.

SECOND CAUSE OF ACTION

The Court makes the following findings of fact for the second cause of action.

(1) This cause of action alleges that trial counsel were ineffective because a defense retained expert was allegedly incompetent by failing to find that the fire was not caused by arson.

* * *

(2) Once again, even in this proceeding, Richey fails to attack Mr. DuBois' qualifications.

(3) In light of Mr. DuBois' qualifications and Richey's failure to attack them, this Court finds that Mr. DuBois was a properly qualified expert.

(4) Richey does not allege that trial counsel were aware that Mr. DuBois, the defense-retained expert, was incompetent; the only fact that Richey relies upon is that Mr. DuBois did not do his own testing of the State's evidence.

(5) In connection with his post-conviction petition, Richey hired two experts to evaluate the State's evidence.

(6) Despite the fact that Richey argues that Mr. DuBois was incompetent for failing to do his own testing, Richey's experts nevertheless reached their conclusions without doing any testing.

Based upon the above findings of fact, the Court makes the following conclusions of law:

(1) Richey fails to allege facts, which if proved, would entitle him to relief, as the Constitution does not guarantee criminal defendants the right to the effective assistance of expert witnesses. Wayne v. Murray (CA. 4) (per curiam), 884 F.2d 765, 766-67, cert. denied (1989), 492 U.S. 936; see also, Pruett v. Thompson (C.A. 4), 996 F.2d 1560, 1573 n.12, cert. denied (1993), 114 S.Ct. 487; Alley v. State (Tenn. Crim. App. 1994), 882 S.W.2d 810, 817.

(2) Trial counsel had no duty to "shop around" for an expert to contradict the State's experts.

(3) Richey also fails to submit evidentiary documents containing sufficient operative facts to demonstrate the lack of competent counsel.

(4) In particular, the record in this case rebuts Richey's

claim; trial counsel acted reasonably in retaining an expert that this Court has found to be qualified.

(5) Richey has tailed to produce evidence to demonstrate that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment (as applied to the states through the Fourteenth Amendment) when he relied on Mr. DuBois.

(6) Richey's failure to demonstrate deficient performance means that this Court may dismiss this claim without a hearing. State v. Jackson (1980), 64 Ohio St.2d 107, syllabus; State v. Kapper (1983), 5 Ohio St.3d 36, 38-39.

THIRD CAUSE OF ACTION

The Court makes the following findings of fact for the third cause of action.

(1) This cause of action alleges that trial counsel were ineffective for failing to adequately investigate the case by not searching for and finding a competent expert to rebut the State's arson evidence.

(2) This cause of action further alleges that trial counsel was ineffective for listing a defense expert on discovery even after learning that the defense expert would not testify favorably to Petitioner.

(3) This cause of action is based upon facts that appeared in the record on direct appeal.

(4) The record and exhibits attached to Richey's petition demonstrate that trial counsel retained an independent expert who was the vice president and a principal of

CTL Engineering, Inc., an engineering consulting firm in Columbus, Ohio. (Transcript, p. 820).

(5) Richey does not allege that Mr. DuBois was not qualified to render an expert opinion.

(6) Richey does not allege any facts in existence at the time of trial that should have led counsel to believe that Mr. DuBois was incompetent.

Based upon the above findings of fact, the Court makes the following conclusions of law:

(1) Richey fails to allege facts, which if proved, would entitle him to relief. See, Second Cause of Action; Poyner v. Murray (C.A.. 4, 1992), 964 F.2d 1404, 1419; Roach v. Martin (C.A. 4), 757 F.2d 1463, 1477, cert. denied (1985), 474 U.S. 865; State v. Maurer (April 25, 1988), Stark App. No. CA-7253, unreported; State v. Combs (1992), 100 Ohio App.3d 90, 102-104; State v. Loft (Nov. 3, 1994), Cuyahoga App. Nos. 66388, 66389, and 66390, unreported.

(2) Richey also fails to submit evidentiary documents containing sufficient operative facts to demonstrate the lack of competent counsel and that the defense was prejudiced by counsel's ineffectiveness; the claim thus may be dismissed without a hearing. State v. Jackson (1980), 64 Ohio St.2d 107, syllabus; State v. Kapper (1983), 5 Ohio St.3d 36, 38-39.

(3) As Petitioners' claim is based upon facts appear in the record, or the mere absence of which supported Petitioner's claim, this claim could have been raised in Petitioner's direct appeal. State vs. Nichols. (1993), 66 0. S. 3d 431. It is therefore now res judicata. State vs.

Perry (1967), 10 0.5. 2d 175.

FOURTH CAUSE OF ACTION

The Court makes the following findings of fact for the fourth cause of action.

(1) This cause of action alleges that trial counsel were ineffective for failing to present an expert to rebut the State's experts' testimony that the fire was caused by arson.

(2) Richey alleges that the mere failure to call an expert was Ineffective assistance of counsel.

(3) The record demonstrates that Richey's trial counsel retained an expert to examine the State's evidence of arson.

(4) The record also demonstrates that Richey's retained expert agreed with the State's conclusion that the fire was caused by arson.

(5) The record further shows that Richey's trial counsel adopted a strategy that attacked the State's evidence concerning the identity of the arsonist.

(6) Neither of Richey's trial counsel represented Richey in his direct appeals.

Based upon the above findings of fact, the Court makes the following conclusions of law:

(1) As Richey's claim is based upon facts appearing in the record, or the mere absence of which supported Richey's claim, this claim could have been raised in

Richey's direct appeal. State v. Nicholas (1993), 66 Ohio St.3d 431, 436; State v. Mahoney (Dec. 27, 1995), Lorain App. No. 94CA006022, unreported. It is therefore now *res judicata.* State v. Perry (1967), 10 Ohio St.2d 175, paragraph nine of the syllabus.

(2) Richey also fails to submit evidentiary documents containing sufficient operative facts to demonstrate the lack of competent counsel and that the defense was prejudiced by counsel's ineffectiveness; the claim thus may be dismissed without a hearing. State v. Jackson (1980), 64 Ohio St.2d 107, syllabus; State v. Kapper (1983), 5 Ohio St.3d 36, 38-39.

(3) Even if this cause of action were not waived due to *res judicata,* this Court would alternatively find that the record confirms that trial counsel employed a reasonable trial strategy by attacking the evidence of identity (see Transcript, pp. 1028-1057, and pages 1029, 1031, 1043, 1045, 1052, 1056-57, in particular). Richey's current suggestion of another strategy does not render counsel ineffective. State v. Post (1987), 32 Ohio St.3d 380, 387-89; State v. Coleman (Mar. 17, 1993), Hamilton App. No. C.900811, unreported.

FIFTH CAUSE OF ACTION

The Court makes the following findings of fact for the fifth cause of action.

(1) This cause of action alleges that appellate counsel were ineffective for failing to raise certain claims listed In Richey's Application for Reopening, attached to the petition to vacate or set aside sentence as Exhibit 5.

(2) Richey does not allege the existence of facts dehors the record in support of this claim nor does he attach any evidentiary material in support.

Based upon the above findings of fact, the Court makes the following conclusions of law:

(1) Claims of ineffective assistance of appellate counsel are not cognizable in post-conviction proceedings. State v. Murnahan (1992), 63 Ohio St.3d 60, paragraph one of the syllabus.

SIXTH CAUSE OF ACTION

The Court makes the following findings of fact for the sixth cause of action.

(1) This cause of action alleges that trial counsel were ineffective at the guilt and penalty phases of Richey's trial.

(2) Richey's claim is based upon facts appearing In the trial record.

(3) Richey does not allege the existence of facts de hors the record in support of this cause of action.

(4) This claim could have been raised in Richey's direct appeal.

(5) Neither of Richey's trial counsel represented him on appeal.

Based upon the above findings of fact, the Court makes the following conclusions of law:

(1) As Richey's claim is based upon facts appearing in the record, or the mere absence of which supported Richey's claim, this claim could have been raised in Richey's direct appeal and it is therefore now *res judicata.* State v. Perry (1967), 10 Ohio St.2d 175, paragraph nine of the syllabus.

SEVENTH CAUSE OF ACTION

The Court makes the following findings of fact for the seventh cause of action.

(1) This cause of action alleges that trial counsel were ineffective for failing to raise an alleged plea offer either as prosecutorial misconduct or as mitigation evidence at the penalty phase.

(2) Richey attached no documentary evidence or affidavits in support of his naked assertion that such a plea offer was ever made.

(3) After the State pointed this out In its motion, Richey secured a supplemental affidavit from William F. Kluge, one of Richey's trial counsel.

(4) In the undated affidavit (which contains crossed-out and handwritten notes that lack a signature or initials), Kluge states that an unnamed prosecutor offered Richey a plea bargain that would have allowed Richey to avoid the death penalty.

(5) R.C. 2953.21(F) requires the petitioner to secure leave of court to amend his petition after the prosecutor has responded to the post-conviction petition.

(6) Richey did not seek leave of court to amend his

petition.

(7) Richey fails to cite any authority for the admissibility of an alleged plea offer or that a prosecutor's offer to a lesser-included offense is prosecutorial misconduct.

Based upon the above findings of fact, the Court makes the following conclusions of law:

(1) As Richey failed to secure leave of court before amending his petition to include an affidavit from trial counsel, the supplemental affidavit is not properly before this Court

(2) Richey failed to submit evidentiary documents or affidavits containing sufficient operative facts to demonstrate the lack of competent counsel and that the defense was prejudiced by counsel's ineffectiveness; the claim thus may be dismissed without a hearing. State v. Jackson (1980), 64 Ohio St.2d 107, syllabus; State v. Kapper (1983), 5 Ohio St.3d 36, 38-39.

(3) Alternatively, even if Richey's allegations were true, his proposed evidence would have been inadmissible under Ohio law. Ohio Evid. R. 410; State v. Sneed (May 22, 1989), Stark App. No. CA-6976, unreported, affirmed (1992), 63 Ohio St.3d 3, 16-17, cert. denied (1993), 507 U.S. 983. Trial counsel were not ineffective in failing to seek admission of inadmissible evidence.

EIGHTH CAUSE OF ACTION

The Court makes the following findings of fact for the eighth cause of action.

(1) This cause of action alleges that trial counsel were ineffective for failing to elicit testimony on four different topics from a witness who testified at trial.

(2) Of the four additional topics, neither Richey nor the witness alleges that counsel knew about the witness' knowledge of two of the topics (concerning Richey's threats and Richey's mood).

(3) With respect to testimony concerning Richey's threats to burn "A Building," the witness' trial testimony conflicts with her affidavit in support of Richey's petition.

Based upon the above findings of fact, the Court makes the following conclusions of law:

(1) Richey fails to submit evidentiary documents containing sufficient operative facts to demonstrate the lack of competent counsel and that the defense was prejudiced by counsel's ineffectiveness; the claim thus may be dismissed without a hearing. State v. Jackson (1980), 64 Ohio St.2d 107, syllabus; State v. Kapper (1983), 5 Ohio St,3d 36, 38-39.

(2) The record confirms that trial counsel employed a reasonable trial strategy by attacking the evidence of identity (see Transcript, pp. 1028-1057, and pages 1029, 1031, 1043, 1045, 1052, 1056-57, in particular). Richey's current suggestion of another strategy, wherein the defense would have attacked the two year-old victim and explained why the smoke detector was detached, is simply an alternative strategy, which does not render counsel ineffective. State v. Post (1987), 32 Ohio St.3d 380, 387-89; State v. Coleman (Mar. 17, 1993), Hamilton App. No. C.900811, unreported.

NINTH CAUSE OF ACTION

The Court makes the following findings of fact for the ninth cause of action.

(1) This cause of action alleges that trial counsel were ineffective for failing to include the entire letter that Richey wrote to his friend in Scotland or to secure an affidavit from "Gogs" to the effect that he had not been killed by Richey.

(2) The trial court had before it the entire letter when considering Richey's pretrial motion to suppress it.

(3) Richey neither alleges nor attaches affidavits or documents to prove that trial counsel had any way of finding "Gogs" or that Richey informed counsel who "Gogs" was.

(4) The letter does not contain a statement that Richey killed "Gogs."

(5) The record in this case is devoid of any evidence to show that the trial court relied on the letter in sentencing Richey to death.

(6) In his direct appeal, Richey claimed error in the introduction of excerpts from the letter in the pre-sentence investigation report.

(7) The court of appeals and the Ohio Supreme Court held that the usual presumption that the trial court considered only the relevant, competent and material evidence in arriving at its sentencing decision unless it affirmatively appears to the contrary, applies in this

case.

Based upon the above findings of fact, the Court makes the following conclusions of law:

(1) As Richey's claim is based upon facts appearing in the record, or the mere absence of which supported Richey's claim, this claim could have been raised in Richey's direct appeal, and it is therefore now *res judicata.* State v. Perry (1967), 10 Ohio St.2d 175, paragraph nine of the syllabus.

(2) Richey fails to submit evidentiary documents containing sufficient operative facts to demonstrate the lack of competent counsel and that the defense was prejudiced by counsel's ineffectiveness; the claim thus may be dismissed without a hearing. State v. Jackson (1980), 64 Ohio St.2d 107, syllabus; State v. Kapper (1983), 5 Ohio St.3d 36, 38-39.

(3) Even if Richey's claim were not waived for the above procedural reasons, this Court would hold that a trial court is presumed to consider only relevant, competent, material evidence.

(4) The three judge panel did not consider the letter in its deliberations, and therefore Richey was not prejudiced.

IT IS SO ORDERED.

/s/ Michael J. Corrigan
MICHAEL J. CORRIGAN, JUDGE
5-12-97

APPENDIX N

Ohio Rev. Code Ann. 2903.01. Aggravated murder.

[as amended by Amended Substitute Senate Bill No. 1, effective Oct. 19, 1981]

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

(D) No person shall be convicted of aggravated murder unless he is specifically found to have intended to cause the death of another. In no case shall a jury in an aggravated murder case be instructed in such a manner that it may believe that a person who commits or attempts to commit any offense listed in division (B) of this section is to be conclusively inferred, because he engaged in a common design with others to commit the offense by force and violence or because the offense and the manner of its commission would be likely to produce death, to have intended to cause the death of any person who is killed during the commission of, attempt to commit, or flight from the commission of or attempt to commit, the offense. If a jury in an aggravated murder case is instructed that a person who commits or attempts to commit any offense listed in division

(B) of this section may be inferred, because he engaged in a common design with others to commit the offense by force or violence or because the offense and the manner of its commission would be likely to produce death, to have intended to cause the death of any person who is killed during the commission of, attempt to commit, or flight from the commission of or attempt to commit the offense, the jury also shall be instructed that the inference is nonconclusive, that the inference may be considered in determining intent, that it is to consider all evidence introduced by the prosecution to indicate the person's intent and by the person to indicate his lack of intent in determining whether the person specifically intended to cause the death of the person killed, and that the prosecution must prove the specific intent of the person to have caused the death by proof beyond a reasonable doubt.

Supreme Court, U.S.
SEP 2 - 2005
OFFICE OF THE CLERK

No. 05-101

IN THE
Supreme Court of the United States

MARGARET BRADSHAW, WARDEN,

Petitioner,

v.

KENNETH T. RICHEY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Sixth Circuit correctly concluded that the state failed to prove each element of aggravated felony murder beyond a reasonable doubt in Richey's case when the statute then contained language requiring that the state prove the defendant "specifically intended to cause the death of the person killed" and the state conceded that the defendant did not intend to cause the death of the person killed?

2. Whether this Court should assume the Court of Appeals failed to follow AEDPA when it cited the appropriate legal standard, cited the decision of the highest state court on the merits, and concluded that the state court decision was "unreasonable"?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATEMENT OF THE CASE 4

A. There Was No Evidence that Richey Intended to Kill Cynthia Collins 4

B. The State Used Unreliable Scientific Evidence to Obtain Richey's Conviction 4

C. The State Courts Refused Richey's Request for Discovery and an Evidentiary Hearing During Post-Conviction Proceedings 6

D. Both the State and Richey Presented New Evidence to the District Court, which Agreed that Richey Had Undermined the State's Evidence 7

E. The Sixth Circuit Carefully Analyzed Two of Richey's Eleven Constitutional Claims and Granted the Conditional Writ of Habeas Corpus on Both Grounds 8

PAGE

REASONS FOR DENYING THE PETITION.....9

I. The Sixth Circuit Analyzed the Sufficiency of the Evidence Question as Directed by this Court's Precedent and in the Same Way as the Other Circuits 9

A. The Sixth Circuit's Primary Analysis Was Consistent with Decisions of this Court and Other Circuits 10

B. In Richey's Direct Appeal, the Ohio Supreme Court Did Not Decide that Transferred Intent is a Permissible Theory of Aggravated Felony Murder 15

C. The Sixth Circuit Performed an Alternate Analysis to Reject the State's Argument that the Ohio Supreme Court on Richey's Direct Appeal Approved Use of Transferred Intent to Prove Aggravated Felony Murder.....19

II. The Sixth Circuit Gave Appropriate Deference to the State Court Decision in Analyzing the Claim of Ineffective Assistance of Counsel.....20

III. The State Has Waived Any Argument Concerning the Propriety of Considering Evidence Not Presented to the State Courts By Not Making the Argument Below.....24

CONCLUSION.....29

TABLE OF AUTHORITIES

CASES: **PAGE**

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970).....26

Bates v. McCaughtry, 934 F.2d 99 (7th Cir. 1991).....17

Bouie v. City of Columbia, 378 U.S. 347 (1964) 20

Cupp v. Naughten, 414 U.S. 141 (1973).....19

Davis v. Strack, 270 F.3d 111 (2d Cir. 2001) 18, 19

Duignan v. United States, 274 U.S. 195 (1927) 26

Eaglin v. Welborn, 57 F.3d 496 (7th Cir. 1995) 17

Einaugler v. Supreme Court, 109 F.3d 836 (2d Cir. 1997) 14, 17

Fenske v. Thalacker, 60 F.3d 478 (8th Cir. 1995).....14, 17

Fiore v. White, 531 U.S. 225 (2000) 12, 14

Gilreath v. Hanks, No. 95-1972, 1996 U.S. App. LEXIS 20340 (7th Cir. 1996) 17

Holland v. Jackson, 124 S. Ct. 2736 (2004).....23, 27

In re Winship, 397 U.S. 358 (1970) 10, 14

Jackson v. Virginia, 443 U.S. 307 (1979) 10, 14

Jeffries v. Blodgett, 5 F.3d 1180 (9th Cir. 1993).....17

Lewis v. Lewis, 321 F.3d 824 (9th Cir. 2003) 21

Lindh v. Murphy, 521 U.S. 320 (1997) 21

Miller v. Champion, 161 F.3d 1249 (10th Cir. 1998).....27

Monroe v. Angelone, 323 F.3d 286 (4th Cir. 2003).....23

Pennsylvania Dep't of Corrs. v. Yeskey, 524 U.S. 206 (1998) 26

Price v. Vincent, 538 U.S. 634 (2003).....22

PAGE

Schultz v. Page, 313 F.3d 1010 (7th Cir. 2002).....21

State v. Solomon, 66 Ohio St. 2d 214 (1981).....15

State v. Sowell, 530 N.E.2d 1294 (Ohio 1988).....15, 16

United States v. Ortiz, 422 U.S. 891 (1975).....26

Williams v. Taylor, 529 U.S. 362 (2000).....21

Williams v. Taylor, 529 U.S. 420 (2000).....27

STATUTES:

28 U.S.C. § 2254(d)(1)-(2).....21

O.R.C. § 2903.01(A).....15

O.R.C. § 2903.01(B).....*passim*

O.R.C. § 2903.01(D).....*passim*

INTRODUCTION

Based on a long-since amended version of Ohio's aggravated felony murder statute, which then required proof that the defendant "specifically intended to cause the death of the person killed," the Court of Appeals reversed Kenneth Richey's conviction on a transferred intent theory and set aside his death sentence because (1) the state had admitted at trial that he had no such intent, and (2) the Ohio Supreme Court had declined to answer a certified question about how to interpret that seemingly unambiguous language. The Court of Appeals also applied the long-standing test of *Strickland v. Washington* to the unique facts of this case to overturn the conviction on the independent ground that Richey received constitutionally ineffective assistance of counsel. Because the Court of Appeals' interpretation of a defunct version of an Ohio statute and its highly fact specific application of the familiar *Strickland* test will not affect any future case, and there is no split in the Circuits or any other important legal or policy reason to review this one-off case, the petition for certiorari should be denied.

Richey's death sentence resulted from a conviction under an aggravated felony murder statute that used to contain language requiring the factfinder to determine whether the accused "specifically intended to cause the death of the person killed." O.R.C. § 2903.01(B) and (D) (1981) (emphasis added). This language was amended out of the statute seven years ago, but when Richey was tried, it arguably precluded conviction for aggravated felony murder on a theory of transferred intent. Since the state had charged Richey only with aggravated felony murder, had tried him only on a theory of transferred intent, and had conceded that he did not intend to cause the death of the person who died, Richey is uniquely situated to argue that his conviction was based on a failure to prove an element of the offense. And

Richey pressed that argument throughout post-conviction proceedings. In the court of appeals he contended that (1) the particular statutory language indeed precluded his conviction based on transferred intent and (2) even if, as the state contended, the Ohio Supreme Court in deciding Richey's direct appeal had implicitly approved transferred intent as an available theory for aggravated felony murder, that would have been an impermissibly retroactive application of the statute in violation of due process.

Contrary to the state's implications, the court of appeals did not run roughshod over state court power to define the elements of state crimes. Before Richey's direct appeal, there was no Ohio decision ruling that transferred intent was an available theory under O.R.C. § 2903.01(B), and the state cites none. Indeed, Richey is the only person ever convicted on a transferred intent theory under that statute. In his direct appeal, Richey's counsel did not argue that transferred intent was unavailable under O.R.C. § 2903.01(B), nor did he cite the critical language of O.R.C. § 2903.01(D). Although the Ohio Supreme Court mentioned transferred intent in discussing the sufficiency of the evidence, it did not decide that the theory was available under O.R.C. § 2903.01(B), nor did it consider the express language of section (D). The Ohio Supreme Court cited only cases under a different aggravated murder provision, O.R.C. § 2903.01(A) (premeditated murder).

On post-conviction, the Sixth Circuit did not rush to interpret O.R.C. § 2903.01(B). It certified the relevant state law questions to the Ohio Supreme Court, but that court declined to answer them. Lacking further guidance from the Ohio courts, the court of appeals then ruled that Richey's conviction for aggravated felony murder was invalid on alternative grounds: After careful review of the particular statutory language and applicable Ohio case law, the court ruled that a transferred intent theory was not permissible under

the aggravated felony murder statute applicable in Richey's case, which expressly required proof that a defendant "specifically intended to cause the death of the person killed." In the alternative, even if the Ohio Supreme Court opinion in Richey's direct appeal could be read to have sanctioned use of a transferred intent theory to convict Richey, that would have been an impermissible retroactive application of a new and unexpected interpretation of the statute. These alternative rulings applying a long-ago amended statute to the specific circumstances of Richey's case do not raise any principle of law worthy of this Court's consideration.

The court of appeals also reversed Richey's conviction on the alternative and independent ground that Richey's trial counsel was ineffective in the handling of expert testimony, particularly the development of a "defense" expert witness who ultimately testified for the state. This was simply a straightforward application of the familiar *Strickland v. Washington* standard to the specific facts–multiple lapses by Richey's trial counsel and the role that the testimony of various experts played in Richey's case. Although the state argues that the Sixth Circuit failed to apply the appropriate standard under AEDPA, the court's opinion consistently cites the appropriate legal standards of cause and prejudice, cites the state court's decision, analyzes the facts, and decides whether the state court ruling was unreasonable. AEDPA requires no more. Finally, having not raised the issue below, the state now complains that the court of appeals relied on facts not considered by the state courts. Yet the facts in question were developed in discovery in federal court–some of it discovery taken by the state–after Richey had sought and been denied such discovery in the state courts. The court of appeals' reliance on such facts is thus entirely appropriate. In sum, the court of appeals' ruling on ineffective assistance of trial counsel offers no basis for granting a writ of certiorari.

STATEMENT OF THE CASE

A. *There Was No Evidence that Richey Intended to Kill Cynthia Collins.*

Kenneth Richey was convicted of starting a fire that resulted in the death of Cynthia Collins, a two-year old girl. The state has never argued that Richey intended to kill Cynthia - in fact, during the direct appeal of Richey's case, the state conceded that it had presented no such evidence. Rather, the state's own trial witnesses admitted that on the night of the fire, Richey was drunk and passed out in the bushes, and then later risked his life when he repeatedly tried to enter the burning apartment in a vain attempt to save Cynthia. Eventually, Richey had to be restrained by police and fire officials for his own safety. Richey's conviction for aggravated felony murder was based solely on a theory of transferred intent–that he intended to kill two people who were not injured in the fire.

B. *The State Used Unreliable Scientific Evidence to Obtain Richey's Conviction.*

The conclusion that the cause of the fire was arson was based on unreliable scientific evidence. During the morning after the fire, the investigators initially concluded that the fire was started by a faulty electric fan. Still, because a fatality had occurred, the State Fire Marshal was called in to investigate. Although the Fire Marshal later testified that he came to believe the fire could be the result of arson during that day, he took no samples for testing by the Ohio Arson Crime Laboratory ("OACL"). Moreover, he failed to maintain the integrity of the fire scene, instead allowing the apartment manager to clean out the apartment. By the end of the day after the fire, no samples had been taken and the apartment had been gutted. Everything, including the carpet the state would later sample and test, was removed to the county landfill.

As the investigation progressed, and focused on Richey, the state determined that it would have materials tested by the OACL for ignitable liquids. The state obtained Richey's clothing from the day of the fire. The tests of Richey's clothing and his boots revealed no traces of any ignitable liquid. The state also obtained samples from the carpet and the wooden deck of the apartment. The carpet was sampled after it had been removed from the apartment, taken to the county landfill, found by sheriff's deputies at the landfill, and brought back to the sheriff's department, where it was laid out in the parking lot no further than 40 feet from gasoline pumps. The samples from the wooden deck were taken nearly three weeks after the apartment had been released. No control samples were ever taken or tested.

The OACL concluded that three samples contained ignitable liquids - one sample from the carpet had gasoline and two (one each from the carpet and the deck) contained paint thinner. All other samples were negative for ignitable liquids. But, as the state's own witnesses admitted during discovery in the federal habeas action, the OACL's methods were never peer-reviewed or published, and in fact, contradicted the results obtained when the generally accepted methods were applied. The Fire Marshal dismissed any concern about the chain of custody issues with the carpet because the carpet sample and the sample from the deck supposedly revealed the same paint thinner.

Although Richey's attorney hired an "expert," L. Gregory Dubois, Dubois's investigation involved no more than talking with the members of the OACL. This "investigation" was further hampered by the fact that DuBois had little training (two two-day courses) in arson investigation and those courses were taught by members of the OACL. He thus had no basis for knowing that the state's methodology was idiosyncratic and differed from generally accepted

methods. Not surprisingly, given this investigation (which was both limited to ten hours and started late due to the actions of counsel), Mr. DuBois eventually agreed with the state. Although he reported that conclusion to Richey's counsel, counsel knew none of the details of the "investigation" – he never asked or even obtained a written report.

DuBois did, however, testify at trial. Through other mistakes, Richey's counsel identified DuBois as a potential trial witness. When he indicated that DuBois would not, in fact, be called, the state accurately read between the lines and subpoenaed DuBois. Although DuBois requested assistance from Richey's counsel in fighting the subpoena, counsel allowed DuBois to testify (without objection) that he agreed with the state's conclusion. Rather than cross-examine DuBois, Richey's counsel then reserved the right to call DuBois himself.

With this uncontroverted (but unreliable) scientific evidence in the record, the three-judge panel (Richey had waived his right to trial by jury at the urging of his counsel) convicted Richey of aggravated felony murder in violation of O.R.C. § 2903.01(B), among other crimes. After a further hearing, Richey was sentenced to death.

C. *The State Courts Refused Richey's Request for Discovery and an Evidentiary Hearing During Post-Conviction Proceedings.*

Following his direct appeals (in which the Ohio Supreme Court affirmed his sentence of death by a 4-3 vote), Richey sought post-conviction relief in the Ohio state courts. As part of his petition, Richey attached the affidavits of two experts, Professor L.P. Custer and Dr. Andrew Armstrong. These experts, in fire reconstruction and forensic chemistry, for the first time identified the scientific flaws in the state's unreliable evidence in support of the arson and aggravated

murder convictions. As part of his petition for post-conviction relief, and later in opposing the state's motion for summary judgment on the petition, Richey requested that the state court permit him to take discovery and that it hold an evidentiary hearing. The state court refused both requests, and denied Richey's petition. The state court of appeals affirmed the denial on the merits, and the Ohio Supreme Court denied jurisdiction.

D. *Both the State and Richey Presented New Evidence to the District Court, which Agreed that Richey Had Undermined the State's Evidence.*

Richey then filed his petition for a writ of habeas corpus. Before the United States District Court for the Northern District of Ohio, Richey again sought discovery in part to support his claim of ineffective assistance of counsel. At the same time, the state sought to take further discovery. The district court allowed both motions. The state argued neither that such discovery was inappropriate nor that AEDPA prevented the court from reviewing evidence obtained in discovery. After completion of discovery, Richey requested an evidentiary hearing; the district court denied the request, but ordered that the record be expanded to include all of the discovery taken, including the depositions of Armstrong, Custer, DuBois, Richey's trial counsel, and others. Both Richey and the state expanded the record before the district court by filing extensive materials obtained through discovery.

On the record, the district court denied Richey's petition. Nevertheless, as part of its lengthy opinion, the district court agreed that Richey's new scientific evidence had substantially undermined the evidence presented by the state at trial to support the conclusion that the fire started as a result of arson. The district court noted both that "the new factual evidence presented to the Court undermines some of the state's trial theory regarding arson," App. 119a, and that "[t]aken

cumulatively, the new evidence supplied during discovery in this case does undermine the scientific findings presented at trial." App. 124a.

E. *The Sixth Circuit Carefully Analyzed Two of Richey's Eleven Constitutional Claims and Granted the Conditional Writ of Habeas Corpus on Both Grounds.*

When Richey appealed that denial, the district court and the Sixth Circuit Court of Appeals granted a certificate of appealability on eleven separate grounds, directed to both his conviction and his sentence. The Sixth Circuit heard argument on May 7, 2003 and issued its decision on January 25, 2005. Analyzing two of Richey's eleven claims, the panel ruled that a conditional writ of habeas corpus should issue on both grounds – (1) the state had failed to prove beyond a reasonable doubt each element of aggravated felony murder, O.R.C. § 2903.01(B), and (2) Richey had received ineffective assistance of counsel, focused on the failure of Richey's trial attorney to retain and work adequately with a competent and qualified expert witness. The Sixth Circuit concluded that "constitutional errors have undermined our confidence in the reliability of Richey's conviction and sentence," App. 2a, and so "[t]he district court's judgment is REVERSED, and the case is REMANDED with instructions that a conditional writ of habeas corpus, giving the State of Ohio ninety days to attempt to retry Richey or release him from custody, be GRANTED." App. 49a-50a. The state sought rehearing and rehearing en banc; these requests were denied on April 15, 2005, with no active judge of the Sixth Circuit even requesting a vote on the request for rehearing en banc. *See* App. 60a-61a.

REASONS FOR DENYING THE PETITION

I. The Sixth Circuit Analyzed the Sufficiency of the Evidence Question as Directed by this Court's Precedent and in the Same Way as the Other Circuits.

The Sixth Circuit's interpretation of a long-since amended statute does not present a reason for granting certiorari. Richey was convicted of aggravated felony murder based on a theory of transferred intent. Yet Ohio's aggravated felony murder statute, at the time of Richey's conviction, contained clear language requiring proof of intent to cause the death of the person killed. Up to the time of Richey's direct appeal to the Ohio Supreme Court, no Ohio case had held that a transferred intent theory was available under the aggravated felony murder statute, and dicta in Ohio appellate cases suggested that the transferred intent theory was not available. Therefore, during post-conviction Richey argued that the state had failed to prove an element of the offense, and after a close reading of the statute and case law the Sixth Circuit agreed.

The state's main counter lies in the Ohio Supreme Court's opinion on Richey's direct appeal. Though Richey's counsel did not argue at trial or on direct appeal that he could not be convicted under the statute on a theory of transferred intent, the Ohio Supreme Court's opinion included a gratuitous and ambiguous passage about transferred intent being an available theory under a different murder statute: murder by prior calculation and design. The state argues that, even though this passage does not cite the aggravated felony murder statute, the passage means that the Ohio court approved the use of the transferred intent theory in Richey's case. The Sixth Circuit, however, pulled the teeth out of this argument in two ways. First, it certified the relevant state law questions to the Ohio Supreme Court–questions that the Ohio court refused to answer. Second, it pointed out that even if the state were reading the direct appeal opinion correctly, the new reading of the statute

would have been so unexpected in light of the statutory language and the existing caselaw as to violate due process.

By its petition, the state is asking this Court to become mired in the interpretation of a long-since amended Ohio statute and in the application of that statute to the particulars of Richey's case. Moreover, the state is asking this Court to interpret the highly ambiguous language of the Ohio Supreme Court, on which nearly all of the state's arguments depend. But none of this is necessary. The Sixth Circuit's opinion is a paradigm of careful reading. It follows the model of this Court's precedents on sufficiency of the evidence, and it shows exemplary respect for Ohio courts and Ohio law. And there is certainly no reason for this Court to try to divine what the Ohio Supreme Court may have meant by the passage on transferred intent in its opinion on direct appeal. The Ohio court had the opportunity to speak for itself upon certification and chose to remain silent. This Court should not join the fray.

A. *The Sixth Circuit's Primary Analysis Was Consistent with Decisions of this Court and Other Circuits.*

The state claims that the Sixth Circuit's decision on the state's failure to prove aggravated felony murder beyond a reasonable doubt "creates a sharp break both with authority from this Court and the uniform opinion of four other circuits," Pet. Cert. 13; the state even argues that "summary reversal may well be appropriate." Pet. Cert. 14. The state's overheated rhetoric is insupportable. Without question a federal constitutional claim is stated when a state convicts a defendant without proof beyond a reasonable doubt of each element of the crime. *Jackson v. Virginia*, 443 U.S. 307, 321 (1979); *In re Winship*, 397 U.S. 358, 364 (1970). To decide such a claim, a federal court must necessarily look to state law, as it applied to the accused, to determine the elements of the crime. Only after those elements are determined can the federal court analyze the constitutional question whether

adequate evidence to convict was presented. The Sixth Circuit's careful, logical, and comprehensive analysis of Ohio's aggravated felony murder statute in the unique circumstances of Richey's case is wholly consistent with the decisions and analytical method of both this Court and the other circuits.

Richey was charged with and convicted of only one capital crime: aggravated felony murder under O.R.C. § 2903.01(B) and (D). Although the state never presents the statutory text to this Court, the language applicable to Richey's conviction was as follows:

> No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

§ 2903.01(B) (1981) (App. 359a). This section of the homicide statute was modified by section (D), which states that proof of intent to "cause the death of another" is not sufficient for aggravated felony murder-the state had to prove beyond a reasonable doubt that the defendant "specifically intended to cause the death of the person killed."

> No person shall be convicted of aggravated murder unless he is specifically found to have intended to cause the death of another. . . . If a jury in an aggravated murder case is instructed that a person who commits or attempts to commit any offense listed in division (B) of this section . . . the jury . . . is to consider all evidence introduced by the prosecution to indicate the person's intent and by the person to indicate his lack of intent in determining whether the person ***specifically intended to cause***

> ***the death of the person killed***, and that the prosecution must prove the specific intent of the person to have caused the death by proof beyond a reasonable doubt.

§ 2903.01(D) (1981) (emphasis added) (App. 359a-360a). This latter language was amended out of the statute in 1998, but Richey's case fit the language perfectly. The state tried Richey solely on a transferred intent theory and conceded that Richey did not intend to cause the death of Cynthia Collins, the person killed. Thus, so long as the statutory language meant what it said, the state did not prove one of the elements of aggravated felony murder in Richey's case.

In this context, the Sixth Circuit's analysis was straightforward and unremarkable. The Sixth Circuit looked to state law to determine the elements of the crime.[1] First, the Sixth Circuit noted that "the Ohio Supreme Court is the ultimate arbiter of the State's law" and "this Court cannot decide what Ohio law should be . . . ." App. 30a. Indeed, the Sixth Circuit attempted to certify the question of the elements of Ohio law to the Ohio Supreme Court, as this Court did in *Fiore v. White*, 531 U.S. 225, 228 (2000), *see* App. 28a, n. 6,

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[1] The state does not argue that the Sixth Circuit failed to give appropriate deference to a state court decision on the merits on this issue because the state argued, and Richey conceded, that this ground was not raised during Richey's direct appeal. Rather, the Sixth Circuit concluded that cause and prejudice (arising from the failure of Richey's counsel to raise this argument) permitted Richey to avoid the procedural default. The state does not ask this Court to revisit that conclusion.

but the Ohio Supreme Court declined to answer the question.[2] Lacking any new guidance from the Ohio court, the Sixth Circuit then turned to the primary source of Ohio law – the statute itself, and Ohio cases interpreting it.

Beginning its analysis with the statutory language quoted above, App. 18a-19a, the court of appeals recognized that the plain meaning was to require proof of specific intent to cause the death of the person killed. App. 19a.[3] Next, acknowledging that court decisions can also shed light on an issue of statutory interpretation, the Sixth Circuit turned to decisions of the Ohio courts analyzing the aggravated felony murder statute. The Sixth Circuit first noted that the Ohio courts had repeatedly interpreted subsection (D) as informing the intent requirement of subsection (B). *See* App. 19a-20a

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[2] Contrary to the suggestion of the state, *see* Pet. Cert. 11 n.1, this Court should not read the refusal of the Ohio Supreme Court as indicating that the state court had already resolved this issue on Richey's direct appeal. Rather, the panel's lengthy certification order (*see* App. 220a-231a) clearly portended the court's ultimate conclusion that Ohio law required proof of intent to kill the person killed for aggravated felony murder. While it is likely inappropriate to read any conclusion from the state court's silence and refusal to answer the certified question, on the record presented in this case it is undoubtedly incorrect to assume the state supreme court refused to answer the question because it disagreed with the Sixth Circuit's clearly foreshadowed interpretation.

[3] Before other courts, the state has attempted to explain the statutory language by presenting an argument that O.R.C. § 2903.01(D) applies only to jury trials and that, since Richey's case was jury-waived, it does not apply. App. 20a-21a. The Sixth Circuit rightly rejected this argument out of hand, noting both that it would be unconstitutionally irrational to have different elements of the same crime before different finders of fact and that, even if this were permissible, it would have been ineffective assistance of counsel per se to waive a jury in that situation. *Id.* The state chooses to ignore the statutory language before this Court, rather than repeat such strained arguments.

(citing Ohio cases). The court then turned to "all the cases that directly touch upon" the issue of transferred intent. App. 24a. Citing both *State v. Sowell* and *State v. Mullins*, the court concluded that "[t]he preceding state case law - and it is the only Ohio case law at the time that squarely addressed this issue - indicates that transferred intent does not apply to subsection D of the aggravated felony murder statute." App. 25a. The court therefore concluded that "we are compelled to adhere to Ohio's specific pronouncements at the time of Richey's conviction and state appeals." App. 25a. On this basis, the Sixth Circuit concluded that the aggravated felony murder statute, as applied to Richey, did not permit a transferred intent theory and did require proof that Richey intended to kill Cynthia Collins, even though the state had conceded he had no such intent. It followed that the petition for habeas corpus should be granted insofar as Richey's conviction for aggravated felony murder was based on a failure to prove an element of the offense beyond a reasonable doubt.

Nothing in the Sixth Circuit's analysis of aggravated felony murder is the least bit out of the ordinary or inconsistent with the holdings of this Court. The Sixth Circuit looked to state law to determine the elements of the crime under the version of the statute applicable at the time of Richey's conviction. This Court itself has repeatedly done the same. *See Fiore v. White*, 532 U.S. at 228-29; *Jackson v. Virginia*, 443 U.S. at 324-25; *In re Winship*, 397 U.S. at 359-60. The Sixth Circuit sought the Ohio Supreme Court's guidance in interpreting the aggravated felony murder statute- a procedure endorsed in *Fiore*. After the Ohio Supreme Court declined to answer, the Sixth Circuit had no choice but to seek guidance, as this Court and other circuits have, in other traditional sources of state law: statutory text and state cases interpreting that statute at the time of the conviction. *See, e.g., Einaugler v. Supreme Court*, 109 F.3d 836, 840-42 (2d Cir. 1997); *Fenske v. Thalacker*, 60 F.3d 478, 480 (8th Cir. 1995).

B. *In Richey's Direct Appeal, the Ohio Supreme Court Did Not Decide that Transferred Intent is a Permissible Theory of Aggravated Felony Murder.*

In the petition, the state's main answer to Richey's challenge to the sufficiency of the evidence is that in Richey's direct appeal the Ohio Supreme Court held that transferred intent was a sufficient basis for Richey's conviction for aggravated felony murder. Although the state acknowledges that Richey did not argue on direct appeal that transferred intent was not a permissible theory, *see* Pet. Cert. 8, the state relies upon the following ambiguous passage from the Ohio Supreme Court decision:

> The fact that the intended victim escaped harm, and that an innocent child, Cynthia Collins, was killed instead, does not alter Richey's legal and moral responsibility. "The doctrine of transferred intent is firmly rooted in Ohio law." *State v. Sowell*, 39 Ohio St.3d 322, 332. Very simply, "the culpability of a scheme designed to implement the calculated decision to kill is not altered by the fact that the scheme is directed at someone other than the actual victim." *State v. Solomon* (1981), 66 Ohio St.2d 214, 218.

Pet. Cert. 8-9 (quoting App. 250a). But the state ignores that Richey was charged with, tried for, and convicted of aggravated felony murder under O.R.C. § 2903.01(B), not murder by "prior calculation and design" under O.R.C. § 2903.01(A). Both cases cited, *Sowell* and *Solomon*, addressed convictions under O.R.C. § 2903.01(A). The language of the Ohio Supreme Court, about "a scheme designed to implement the calculated decision to kill," hearkens to subsection (A): "No person shall purposely, and with prior calculation and design, cause the death of another." O.R.C. § 2903.01(A) (1981) (App. 359a). And in *Sowell* the Ohio Supreme Court distinguished subsections (A) and (B), affirming the

transferred intent conviction under subsection (A) while noting in dictum that such a conviction would not obtain under subsection (B). Thus, in rejecting Sowell's argument that the addition of O.R.C. § 2903.01(D) in 1981 eliminated the application of transferred intent in subsection (A) cases, the Ohio Supreme Court stated:

> Subsection (D) of R.C. 2903.01 deals specifically with subsection (B) of that statute, which defines the offense known as "felony murder." It does not affect R.C. 2903.01(A), which is involved in the case at bar, or our holding in *State v. Solomon*.

State v. Sowell, 530 N.E.2d 1294, 1305 (Ohio 1988). As the Sixth Circuit observed, the plain meaning of this passage is that subsection (D) *does* eliminate transferred intent for a charge under subsection (B).

The Sixth Circuit was correct to conclude that the Ohio Supreme Court in Richey's direct appeal did not sanction the use of a transferred intent theory to prove aggravated felony murder. At the time of the direct appeal, Richey's appellate counsel had not argued for this distinction between subsection (A) and subsection (B). In fact, the issue had not come up at all. In that context, the Ohio Supreme Court's throwaway reference to transferred intent in Richey's direct appeal, supported only by cases under subsection (A), and made without any reference to subsection (B), should not be read as an interpretation of subsection (B).

In short, the Ohio Supreme Court did not decide the transferred intent issue in Richey's direct appeal, which means that no case had squarely decided the issue. And this left the Sixth Circuit to look to the statutory language and to cases such as *Sowell* and *Mullins* to define the elements of aggravated felony murder. The Sixth Circuit's effort to understand that language and those cases is a model of care and close reading.

Although the state tries to suggest otherwise, none of the circuit cases identified by the state are in conflict with the Sixth Circuit's methodology. Surely none hold that, whenever a state appellate court has affirmed the conviction on direct appeal, there is no need to determine what state law defines as the elements of the crime. Instead the circuit cases simply hold that in identifying those elements a federal court should look to state statutory language and state court decisions, sometimes including a decision in the petitioner's own case.[4]

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[4] In the state's lead case, the unreported Seventh Circuit decision in *Gilreath v. Hanks*, No. 95-1972, 1996 U.S. App. LEXIS 20340 (7th Cir. 1996), the court did not simply rely upon the state court affirmance of the defendant's conviction to hold that transferred intent was a permissible theory to support a conviction. Rather, the Seventh Circuit cited both the relevant statute and case law in concluding that "[t]he Indiana Supreme Court recognizes the doctrine of transferred intent." *See also Einaugler v. Supreme Court*, 109 F.3d 836, 840-42 (2d Cir. 1997) (citing New York statute and case law in addressing claim that constitutionally insufficient evidence had been presented); *Fenske v. Thalacker*, 60 F.3d 478, 480 (8th Cir. 1995) (same, citing Iowa statute and case law). In other cases cited by the state, the circuits stated that the state supreme court, on direct appeal, had explicitly reached the opposite conclusion to that requested by the petitioner in the direct appeal on a pure question of state law. *Bates v. McCaughtry*, 934 F.2d 99, 101 (7th Cir. 1991) (noting that issue had been explicitly raised and decided during direct appeal); *Jeffries v. Blodgett*, 5 F.3d 1180, 1194 (9th Cir. 1993) (noting that issue was directly addressed and resolved by state court on direct appeal). In those cases, the petitioner did not even argue that the state court had not resolved the issue, nor that the resolution of that issue by the state court raised any new interpretation. Rather, the petitioners simply sought reconsideration by the federal court of the state court's state law conclusions. The federal courts of appeal, not surprisingly, refused to reconsider those decisions. Still other cases cited by the state address the separate situation where state law requirements are well-established and the question is whether the state's law is unconstitutional. *See, e.g., Eaglin v. Welborn*, 57 F.3d 496 (7th Cir. 1995) (en banc) (addressing whether it is permissible to allow a defendant to raise affirmative defense of entrapment only if he admits to fact of committing accused acts).

And that principle supports the state's position if, and only if, the state is correct on two fundamental contentions: (1) the Ohio Supreme Court in Richey's direct appeal did clearly decide that transferred intent sufficed in an aggravated felony murder case and (2) despite statutory language and caselaw pointing to the contrary interpretation, the Ohio Supreme Court could apply this new decision about transferred intent to Richey without violating due process. To resolve these two issues, this Court will necessarily have to involve itself deeply in interpreting the now-repealed language of subsection (D), the relevant Ohio cases predating Richey's direct appeal, and the ambiguous language of the Ohio Supreme Court's opinion on direct appeal. Only after pursuing these inquiries–all of which are unique to Richey's case–will this Court be able to determine whether the petitioner or the Sixth Circuit is correct in its reading of the then-applicable Ohio law. In short, Richey's case presents no split in the circuits about doctrinal principles, but merely the possibility of a disagreement between the state and the court of appeals about the proper interpretation of state law and its proper application to Richey.

One of the circuit cases cited by the state is particularly instructive. In *Davis v. Strack*, 270 F.3d 111 (2d Cir. 2001), the Second Circuit considered whether a jury charge of "justification" was required under New York law and, therefore, whether the failure to give the charge resulted in a violation of the defendant's due process rights. The issue was raised, and rejected, in the New York courts during the direct appeal. *Id.* at 120-21. Despite this resolution, the Second Circuit revisited the conclusion and granted the habeas petition. The Second Circuit reviewed the New York statute, *id.* at 124, and then the relevant case law interpreting the statute. *Id.* at 124-25. Applying this law to the facts of the case, the Second Circuit concluded that the New York courts reached an incorrect conclusion: "The Appellate Division

unreasonably rejected Davis's due process challenge. On the basis of the evidence presented, Davis had a clear right under New York law to have the jury consider his defense, and the trial in which he was denied that right was egregiously at odds with the standards of due process propounded by the Supreme Court in *Cupp*." *Id.* at 133 (citing *Cupp v. Naughten*, 414 U.S. 141 (1973)). The Second Circuit thus went much further than did the Sixth Circuit here, granting a petition for a writ of habeas corpus on a question that was actually raised, and addressed, by the state courts on the merits. Far from creating a circuit "split," the Sixth Circuit's careful approach to state law in *Richey* was wholly consistent with the decisions of other circuits – including those cited by the state.

C. *The Sixth Circuit Performed an Alternate Analysis to Reject the State's Argument that the Ohio Supreme Court on Richey's Direct Appeal Approved Use of Transferred Intent to Prove Aggravated Felony Murder.*

The Sixth Circuit also performed an alternative analysis which assumed that the state was correct and transferred intent was a permissible theory. The Sixth Circuit concluded that, given the statutory language and the case law applicable to Richey, any conclusion that transferred intent *was* permissible would violate Richey's due process rights.

> [B]ecause there was not a single judicial pronouncement suggesting that transferred intent could be used under subsection D, and because the prior case law affirmatively indicates to the contrary, the Ohio Supreme Court would have raised a federal constitutional concern of impermissible retroactivity, had it authoritatively read transferred intent into subsection D. Therefore, if we accept the State's interpretation of the Ohio Supreme Court's opinion as having done this, it would have been a retroactive

> or novel application of a statute which would have violated Richey's clearly established rights under the Due Process Clause.

App. 30a. In the petition, the state acknowledges the validity of the Sixth Circuit's legal theory: "a state court's determination of the elements could potentially be so novel or unexpected that it would violate a defendant's due process rights." Pet. Cert. 17-18 (citing *Bouie v. City of Columbia*, 378 U.S. 347, 249-50 [sic] (1964)). And the state barely challenges the Sixth Circuit's conclusion. *See* Pet. Cert. 19-20. The state tries to suggest that the Sixth Circuit did not mean to make a true alternative holding–though the language quoted above gives the lie to the state's suggestion. The state also tries to suggest that the absence of an Ohio Supreme Court case *holding* that subsection (B) forbade a transferred intent theory defeats any claim based on a retroactive or novel application. But no precedent suggests that a novel interpretation of a statute can violate due process only if the state's highest court previously held for the contrary interpretation. Surely a new or retroactive interpretation can violate legitimate expectations created by statutory language and persuasive case law. Thus, the Sixth Circuit's alternate holding is a further reason why the transferred intent language in the opinion on Richey's direct appeal should have had no impact on the outcome of Richey's habeas petition.

II. The Sixth Circuit Gave Appropriate Deference to the State Court Decision in Analyzing the Claim of Ineffective Assistance of Counsel.

The Sixth Circuit's decision evidences the appropriate deference to a state court decision. In arguing that the Sixth Circuit failed to give appropriate deference to the state court's decision, the state would apparently require some particular method or formula be followed by the courts of appeal. But this Court has never required a particular procedure or the

recitation of certain key words to demonstrate deference. Moreover, even if a particular formula were required, it would look just like the Sixth Circuit's decision here – a recitation of the appropriate standard, a citation to the state court decision, analysis, and a conclusion that the state court's decision to the contrary was unreasonable. As the Sixth Circuit provided just such an analysis, there is no basis for this Court to grant the petition for a writ of certiorari.

The Sixth Circuit deferred to the final state court decision on the question of ineffective assistance of counsel.[5] The Sixth Circuit began its decision with a recitation of the appropriate legal standard for habeas review.

> We apply the familiar habeas rules. Because Richey's petition was filed after April 24, 1996, it falls under the restrictions imposed by the Antiterrorism and Effective Death Penalty Act ("AEDPA"). *Lindh v. Murphy*, 521 U.S. 320, 326 (1997). AEDPA requires that we respect any determination made by the state court unless it: (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." 28 U.S.C. §§ 2254(d)(1)-(2); *see also Williams v. Taylor*, 529 U.S. 362 (2000).

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[5] In the Petition, the state appears to seek deference to the lower court decision. The state cites the trial court's denial of state post-conviction relief, *see* Pet. Cert. 22 (citing App. 350a), even though the state court of appeals later addressed this issue on the merits. *See* App. 336a-342a. Under AEDPA, deference is properly given to the decision of the state's highest court to address the question on the merits. *See, e.g., Lewis v. Lewis*, 321 F.3d 824, 829 (9th Cir. 2003); *Schultz v. Page*, 313 F.3d 1010, 1015 (7th Cir. 2002).

App. 17a (parallel citations omitted). The state does not argue that this panel somehow got this standard wrong; rather, it claims that despite reciting it, the Sixth Circuit failed to apply this standard.

A review of the opinion concerning ineffective assistance of counsel belies the state's claim. When it turned to the claim of ineffective assistance of counsel, the Sixth Circuit first noted that the "[t]he state courts evaluated and decided this claim on the merits." App. 39a (citing state court decision). The Sixth Circuit then analyzed both whether counsel's performance had been deficient and, having found deficient performance, whether it resulted in prejudice to Respondent Richey. At the conclusion of each section, the Sixth Circuit explicitly concluded that "[t]he state court's conclusion to the contrary was unreasonable." *See* App. 45a; App. 61a.[6] There is simply no support in the actual text of the decision from the Sixth Circuit to support the assertion that the Sixth Circuit failed to apply appropriate deference.

This case is thus unlike *Price v. Vincent*, 538 U.S. 634 (2003), relied upon by the state. In *Price*, the court of appeals recited the appropriate standard but then explicitly refused to apply it. "Although the Court of Appeals recited this standard, it proceeded to evaluate respondent's claim *de novo* rather than through the lens of § 2254(d), apparently because it 'agree[d] with the district court that whether the state trial judge acquitted [respondent] of first-degree murder is a question of law and not one of fact." *Id.* at 639 (citations omitted). Here, unlike in *Price*, the Sixth Circuit explicitly gave deference to the state court decision.

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[6] Even though the panel reiterated that its conclusion was reached by deferring to the state court decision in denying the state's petition for rehearing, *see* App. 61a (instructing the addition of a sentence to the conclusion of the prejudice section), the state in its Appendix has failed to include the appropriate language. *See* App. 49a.

The lengths to which the state will go to convince this Court to the contrary are demonstrated by the state's repeated misrepresentations of the record in this case. In support of its reading of the Sixth Circuit's decision, the state argues that the dissent "noted that, in undertaking a de novo *Strickland* analysis, the majority exceeded the federal court's proper role under AEDPA." Pet. Cert. 13. That would come as a surprise to the dissenting judge, who actually wrote that "[t]he majority correctly states the scope of review under AEDPA." App. at 52a. Like the panel, the dissent noted that "we must decide whether [the state court's] application of the *Strickland* 'standard was 'objectively unreasonable.'" *Id.* at 54a. While the dissent disagreed with the final conclusion of the panel, Judge Siler did not disagree with the standards applied or the analysis conducted.[7]

The deference offered by the Sixth Circuit to the state court's decision may not even be necessary. In *Holland v. Jackson*, 124 S. Ct. 2736 (2004), this Court assumed that *de novo* review of a claim of ineffective assistance of counsel was appropriate where new evidence is considered in the federal habeas action. *Id.* at 2738 (citing *Monroe v. Angelone*, 323 F.3d 286, 297-99 & n.19 (4th Cir. 2003)). Thus, although the federal courts did give deference to the state court decision, that deference may not even have been necessary in the instant case.

In requesting that this Court grant the petition for a writ of certiorari to review the Sixth Circuit's conclusion that Richey received ineffective assistance of counsel, the State never discusses the Court's actual decision. The state never even argues that Richey's counsel was constitutionally

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[7] Similarly, when the state presented this same argument to the Sixth Circuit in seeking rehearing en banc, not a single judge of that court even requested a vote on the en banc request. *See* App. 60a-61a.

effective or tries to explain why counsel's failures were not prejudicial. Rather, the state only attacks the Sixth Circuit's decision as not giving the necessary deference to the state court. But as even the dissent acknowledged, the panel's decision deferred to the state court decision. The petition for a writ of certiorari on this ground should be denied.

III. The State Has Waived Any Argument Concerning the Propriety of Considering Evidence Not Presented to the State Courts By Not Making the Argument Below.

In a final maneuver to get this Court to review the decision of the Sixth Circuit, the state now argues (for the first time) that the courts below improperly relied upon evidence not presented during the state court proceedings. Relying upon this Court's decision in *Holland v. Jackson*, the state sets out a bright line rule that "a federal court cannot rely on facts not presented to the state court as a basis for determining that the state court acted unreasonably." Pet. Cert. 25. But the state never presented this argument to the courts below. To the contrary, the state repeatedly relied upon evidence discovered during the federal habeas proceeding in arguing that Respondent's habeas petition should be denied. Now, having lost in the court below, the state reverses direction and accuses the Sixth Circuit of committing error for relying upon the very evidence the state itself presented. But even if the argument were not waived (and it plainly is), the state is wrong. This Court's precedent allows the presentation of facts to the federal courts that were not presented to the state courts in circumstances such as those present here.

The state has waived any argument that the federal courts could not rely on evidence not presented to the state courts. Before the Sixth Circuit, the state repeatedly relied upon "facts that had not been before the state court, but had instead been developed for the first time in federal habeas." Pet. Cert. 24. In arguing that Richey's counsel had not been ineffective

in working with the "expert" he retained, the state relied upon no fewer than three separate depositions taken as part of discovery in the federal habeas action. Two of those depositions, of Richey's trial counsel and Dr. Armstrong, *were taken by the state*. In responding to claims not addressed by the Sixth Circuit (because they had already determined the petition should be granted in full), the state relied upon even more evidence obtained during discovery in the federal habeas action. For example, concerning ineffective assistance of trial counsel for conduct other than that discussed by the Sixth Circuit, the state relied upon three more depositions (Gregory Donohue, Richey's second trial counsel; Mary Margaret Villearreal, a witness from trial who later recanted her testimony; and Hope (Collins) Sterling, the mother of Cynthia Collins). Again, two of these three depositions (Donohue and Villearreal) were *taken by the state*. And in responding to Respondent's claim of actual innocence, the state relied upon no fewer than five depositions from the federal habeas action before the Sixth Circuit. Despite these repeated discussions of "new evidence" not presented to the state courts, the state never argued below that such evidence could not be considered.[8] To the contrary, the state repeatedly relied upon such evidence to support its positions.

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[8] The federal district court went even further and conducted its own research on scientific and technical matters, and then cited the results of that research in the decision, despite refusing Richey's request for an evidentiary hearing. *See* App. 121a (citing article by Tony Café). The author of that article submitted an affidavit before the Sixth Circuit, in which he explained "that the district court 'miscited and misunderstood my published articles' and that 'most of the world's leading forensic scientists in this field would be horrified if they saw the chromatograms used to convict Kenny Richey.'" *See* App. 16a. Before the Sixth Circuit, the state argued that the district court did not err in relying even upon its own technical research.

Having lost in the Court below after relying extensively on evidence not presented to the state courts, the state cannot now be heard to argue that the courts below erred in relying on such evidence. This Court will not address questions not raised in the courts below. *See, e.g., Pennsylvania Dep't of Corrs. v. Yeskey*, 524 U.S. 206, 212-13 (1998) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."); *United States v. Ortiz*, 422 U.S. 891, 898 (1975) ("Examination of the Government's brief in the Ninth Circuit indicates that it did not raise this question below. . . . We therefore decline to consider this issue, which was raised for the first time in the petition for certiorari."); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."); *Duignan v. United States*, 274 U.S. 195, 200 (1927) ("This Court sits as a court of review. It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed."). The reason for such a refusal is demonstrated by the state's argument here. The state argues that Richey "makes no effort to show . . . that these facts were unavailable at the time of the state court proceedings." Pet. Cert. 26. But the state can only make this argument now because it failed to challenge this evidence below. As the state conceded the evidence was properly considered by the federal courts, Richey did not need to argue that the evidence could be considered.

Furthermore, even if the argument was not waived, the federal courts properly relied upon the new evidence in this case. Before the state courts, Respondent filed a Petition to Vacate or Set Aside Sentence, as required by Ohio procedure. Attached to that petition were the affidavits of two technical experts, Professor L.P. Custer and Dr. Andrew Armstrong. Custer and Armstrong, nationally recognized experts in fire

reconstruction and forensic chemistry respectively, both opined that based upon a review of the record, no scientifically valid evidence supported the state's conclusion that the fire at issue was the result of arson. To further support this claim, Richey requested that the state court allow him to take discovery and hear testimony in an evidentiary hearing. The state court denied these requests and granted the state's motion for summary judgment without a hearing. As this Court plainly explained in *Williams v. Taylor*, 529 U.S. 420 (2000), a habeas petitioner "fail[s] to develop the factual basis of a claim" when he bears some fault and responsibility for the failure to develop the record. *Id.* at 430-32 ("In this sense, a person is not at fault when his diligent efforts to perform an act are thwarted, for example, by the conduct of another or by happenstance. . . . We conclude Congress used the word 'failed' in the sense just described."); *see also Holland v. Jackson*, 124 S. Ct. 2736, 2738 (2004) (acknowledging that new evidence can be considered in federal habeas action "if respondent was not at fault in failing to develop that evidence in state court"). A habeas petitioner is diligent, and thus not at fault, when he seeks an evidentiary hearing, or other investigatory resources, from the state court, even if that court denies the request. *Williams*, 529 U.S. at 437, 442-43 (holding petitioner was diligent because he requested money to hire an investigator, even though state supreme court denied request) ("Diligence will require in the usual case that the prisoner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law.").[9] Here, Richey made every reasonable effort to

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[9] This Court previously has acknowledged that requesting an evidentiary hearing in state court was sufficient to demonstrate due diligence. *See Williams v. Taylor*, 529 U.S. 420, 432 (2000) (citing *Miller v. Champion*, 161 F.3d 1249, 1253 (10th Cir. 1998)).

develop this record in the state court; the state courts denied his requests. The federal court properly relied upon this new evidence.[10]

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[10] The state also argues that "at least some of those 'facts' [relied upon by the Sixth Circuit] were simply wrong." Pet. Cert. 26. While a review of the entire factual record as set forth during the habeas proceedings is unnecessary here, the state once again misstates the record. The one example provided by the state was that Mr. DuBois knew the carpet had been taken to the garbage dump. Pet. Cert. 25-26. But the Sixth Circuit repeatedly discussed the deposition testimony of Mr. DuBois and explicitly noted that DuBois testified, "I don't think [that counsel] told me the entire sequence of events involving the carpeting after the fire and before trial." App. 9a; *see also* App. 42a (noting that "DuBois does not remember precisely what trial counsel told him"). The state's selective quotation of testimony, out of context and without regard to the analysis actually conducted by the Sixth Circuit, does not support granting the petition for a writ of certiorari.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 05-101

In The Supreme Court Of The United States

MARGARET BRADSHAW, Warden,
Petitioner,

v.

KENNETH T. RICHEY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

A. The Sixth Circuit disturbed the fundamental balance of power between federal and state courts. 2

B. The Ohio Supreme Court decided that transferred intent applied, leaving no room for the Sixth Circuit to decide otherwise. 2

C. The Sixth Circuit's "novel interpretation" reasoning is not an alternative holding. 5

D. Richey fails to rehabilitate the Sixth Circuit's abrogation of the AEDPA standard in its review of his ineffective-assistance-of-counsel claim. 6

CONCLUSION 10

TABLE OF AUTHORITIES

Cases **Page**

Bell v. Cone,
535 U.S. 685 (2002) 7, 8

Cone v. Bell,
243 F.3d 961 (6th Cir. 2001), *rev'd*, 535 U.S. 685 (2002) 7, 8

Davis v. Strack,
270 F.3d 111 (2d Cir. 2001) 4, 5

Estelle v. McGuire,
502 U.S. 62 (1991) 5

Holland v. Jackson,
124 S. Ct. 2736 (2004) 9

Price v. Vincent,
538 U.S. 634 (2004) 8

State v. Sowell,
39 Ohio St. 3d 322 (1988) 3

Strickland v. Washington,
466 U.S. 668 (1984) 7, 8

Wareham v. State,
25 Ohio St. 601 (1874) 3

Williams v. Taylor,
529 U.S. 420 (2000) 9

Statutes and Regulations **Page**

28 U.S.C. § 2254 9
Ohio Revised Code § 2903.01 3

INTRODUCTION

Despite Richey's suggestion to the contrary, this case is *not* about "the Court of Appeals' interpretation of a defunct version of an Ohio statute." Richey Opp. Br. ("Opp.") at 1. Rather, this case presents foundational questions as to the scope of the federal courts' authority under AEDPA to undo state criminal convictions. The decision below dramatically—and improperly—undercuts the finality of state criminal convictions in two distinct ways.

First, the Sixth Circuit exercised a power that no other federal court has ever claimed—the power to overrule a state supreme court's determination as to the elements of a state law crime. The Ohio Supreme Court said (in Richey's own case) that transferred intent *does* apply to Richey's crime; the Sixth Circuit said it *does not*. Richey, recognizing that federal habeas courts can't re-decide state law issues, now desperately claims that "the Ohio Supreme Court did not decide the transferred intent issue in Richey's direct appeal." *Id.* at 15. The Ohio Supreme Court's express language, though, refutes that claim:

> The fact that the intended victim escaped harm, and that an innocent child, Cynthia Collins, was killed instead, does not alter Richey's legal and moral responsibility. The doctrine of transferred intent is firmly rooted in Ohio law.

App. 250a (quotation marks omitted). In short, the Ohio Supreme Court *did* answer the question, and the Sixth Circuit lacked the authority to reject that answer.

Second, Richey has failed to rehabilitate the Sixth Circuit's decision on his ineffective assistance claim. Richey first argues that the Sixth Circuit did, in fact, give appropriate deference to the state court decision, see Opp. at 10–14, but he fails to substantiate that claim. Every aspect of the panel's analysis, save one, reads like de novo review. And the only

exception—a few passing references that "the state court's decision to the contrary was unreasonable"—is not enough to change that conclusion. Perhaps recognizing that, Richey also tries a bolder tactic, claiming that deference "may not even be necessary." *Id.* at 23. That claim, however, further demonstrates the need for review as it cannot be squared with AEDPA's language, confirmed by the Court's cases, commanding deference to state court decisions.

In short, Richey's opposition confirms that the Sixth Circuit overstepped its bounds, creating a clear conflict with the Court's precedent and the uniform understanding among the circuits. Given the tens of thousands of habeas petitions filed every year, that conflict urgently calls for review.

A. The Sixth Circuit disturbed the fundamental balance of power between federal and state courts.

By substituting its own view of state law for that of the state supreme court, the Sixth Circuit undermined the finality of *all* state criminal convictions, regardless of the specific crime at issue. Richey thus misses the point entirely when he argues that the specific statutory language underlying Richey's conviction is "long-since amended" and now "defunct," Opp. at 1, 3, 12, and when he characterizes the Sixth Circuit's impermissible analysis as "highly fact specific," *id.* at 1. The particular criminal statute and the facts of Richey's crime are wholly irrelevant to the real issue here—namely the Sixth Circuit's willingness to embark on a de novo interpretation of state law, an analysis it conducted in the face of a clear and specific Ohio Supreme Court interpretation of the same law made earlier in the same case under review. Neither the specific facts of his case nor later changes to Ohio law can undo the damage the decision below inflicts on the federal habeas process itself.

B. The Ohio Supreme Court decided that transferred intent applied, leaving no room for the Sixth Circuit to decide otherwise.

Despite Richey's claims to the contrary, the Ohio Supreme Court *did* decide the transferred intent issue. During Richey's direct appeal, the Ohio Supreme Court, fully aware that Richey was convicted of aggravated felony murder under Ohio Revised Code ("O.R.C.") § 2903.01(B), unequivocally stated that "the fact that the intended victim escaped harm, and that an innocent child, Cynthia Collins, was killed instead, does not alter *Richey's* legal and moral responsibility." App. 250a (emphasis added). And the Ohio Supreme Court did not stop there. It bolstered this statement by citing its own cases establishing that "[t]he doctrine of transferred intent is firmly rooted in Ohio law," *id.* (citing *State v. Sowell*, 39 Ohio St. 3d 322 (1988)), by looking to decisions from other states, and by discussing the historic justification for the transferred intent doctrine. See *id.* at 251a (citing *Wareham v. State*, 25 Ohio St. 607 (1874)).

In fact, the state court's analysis of transferred intent comprises the bulk of its discussion regarding Richey's sufficiency-of-the-evidence claim. The discussion of that claim consists of eleven paragraphs, nine of which have substantive analysis. See App. 248a–51a. Of those nine, four are devoted solely to the issue of Richey's intent, and three of those four are devoted solely to *transferred* intent. See *id.* at 250a–51a. No other issue in this section commands more than a single paragraph.

Nonetheless, Richey now maintains that "the Ohio Supreme Court did not decide that transferred intent is a permissible theory of aggravated felony murder," thus leaving the Sixth Circuit free, in Richey's view, to embark on its own analysis. Opp. at 15. Even though the Ohio Supreme Court directed its comments "to *Richey's* legal and moral responsibility," App. 250a (emphasis added), Richey now argues that the court's remarks were really limited to murder under O.R.C. § 2903.01(A) (murder by prior calculation or design)—a crime that Richey was neither charged with nor convicted of—rather than murder under O.R.C. § 2903.01(B)

(felony murder)—the crime of which Richey was convicted. But Richey fails to provide *any* reason why the state supreme court would analyze a crime Richey was *not* charged with, rather than addressing the actual crime at issue in his case. And the Ohio Supreme Court's opinion certainly gives no indication that the court was doing so.

Next, Richey suggests that the Ohio Supreme Court could not have decided the issue because Richey did not raise it. Opp. at 15. But regardless of whether Richey raised it or not, the Ohio Supreme Court was free to reach the issue *sua sponte*. All that matters is that the court did, in fact, reach the issue. And the Sixth Circuit, in rejecting Ohio's procedural default argument, specifically noted that "it is clear that the Ohio Supreme Court considered the issue of transferred intent generally with regards to Richey's case." App. 32a. In essence, Richey, not unlike the court below, is trying to have it both ways—arguing in order to avoid procedural default that the state court *did* reach the issue, while at the same time insisting that the state court *did not*, so that the federal court was free to consider the issue de novo. In short, the state court decided the issue, and that state law decision is binding on federal courts in habeas.

Nor can Richey take refuge in the Ohio high court's decision not to answer the Sixth Circuit's certified question on transferred intent. Opp. at 9. If the state court's silence means anything, it is more likely that the state court recognized that its earlier holding *in Richey's own case* already resolved the matter. It would be strange indeed to presume that a state high court's silence as to a certified question shows that the court never has opined on an issue. Having stated its view once, a state supreme court should not be required to say "we really meant it" in response to a certified question in order for its ruling to be effective.

Finally, despite his attempt, Richey cannot reconcile the decision below with the Second Circuit's approach in *Davis*

v. Strack, 270 F.3d 111 (2d Cir. 2001). True, the Second Circuit granted habeas corpus relief after finding a violation of New York state law grievous enough to also offend the Due Process Clause. But the similarity between *Davis* and this case stops there. The Second Circuit accepted without pause the New York Court of Appeals' determination of how the justification defense to homicide worked under New York law. *Id.* at 125–26. It simply determined that under the law *as articulated by the New York high court*, the trial court had required too much of the defendant when it disallowed a certain jury instruction the defendant had requested. *Id.* at 126–28. Thus, unlike the court here, the Second Circuit wholly deferred to the New York high court on the state law question. Indeed, the Second Circuit repeatedly ensured that it was not rewriting New York law. *See id.* at 123 ("'[I]t is not the province of a federal habeas court to reexamine state-court determinations of state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States.'") (quoting *Estelle v. McGuire*, 502 U.S. 62 (1991)); *id.* at 124 n.4 ("[O]ur role here is not to interpret New York's law of justification, but to determine whether the evidence was sufficient to warrant a justification charge under that law."). By contrast, the Sixth Circuit determined, in direct contravention of the Ohio Supreme Court's in-depth analysis of transferred intent, that how transferred intent applied to Richey's crime was an open question. And it then started from scratch in deciding Ohio law. That goes far beyond both *Davis* and the framework AEDPA demands.

C. The Sixth Circuit's "novel interpretation" reasoning is not an alternative holding.

The petition discussed how the Sixth Circuit attempted to bolster its reinterpretation of Ohio law with the argument that, if the state supreme court had allowed transferred intent for felony murder, that would have amounted to a "novel interpretation" in violation of the Due Process Clause. See

Pet. at 19–21. Richey responds by asserting that this "alternative analysis" (as he originally labels it, Opp. at 19) is really an "alternative holding" (as he later calls it, *id.* at 20), or, in other words, that the Sixth Circuit actually *accepted* the Ohio Supreme Court's view on transferred intent, but found that this interpretation violated the Due Process Clause.

As Richey's evolving labels suggest, however, the due process discussion was *not* an alternative holding. Instead, as the opinion's language clearly shows, the Sixth Circuit relied on the "novel interpretation" due process theory only as support for its claim that the Ohio Supreme Court did not, in fact, reach the transferred intent issue. See App. 30a ("[T]he Ohio Supreme Court *would have* raised a federal constitutional concern of impermissible retroactivity, *had it* authoritatively read transferred intent into" the statute.) (emphasis added).

Moreover, as the petition shows, even if the Sixth Circuit's analysis in this regard could be construed as an "alternative holding," it too would merit reversal. Pet. at 19–20. Richey's only response is one sentence, without authority, that "[s]urely a new or retroactive interpretation can violate legitimate expectations created by statutory language and persuasive case law." Opp. at 20. While that may be correct as an abstract due process principle, Richey has not even attempted to show, nor could he, that the Ohio Supreme Court's recognition of transferred intent here—a recognition consistent with over 100 years of Ohio criminal law—somehow violates that principle.

D. Richey fails to rehabilitate the Sixth Circuit's abrogation of the AEDPA standard in its review of his ineffective-assistance-of-counsel claim.

The petition showed that the Sixth Circuit essentially ignored ADEPA's standard of review and instead reviewed Richey's ineffective-assistance claim de novo. See Pet. at 21–27. Indeed, apart from the conclusory (and initially

omitted) statement that "[t]he state court's conclusion to the contrary was unreasonable," App. 61a, the Sixth Circuit's analysis is identical to what a federal court would do on direct review—a far cry from what AEDPA commands. And Richey's opposition provides no reason to believe that the court below actually engaged in the "unreasonable application" analysis that AEDPA, and this Court's precedents, require.

Richey does not—because he cannot—identify any "analysis" from the Sixth Circuit that indicates how or why the state court's *Strickland* application was "objectively unreasonable." Richey's own words tell the story. He describes the lower court's *Strickland* analysis like this: "The Sixth Circuit then analyzed both whether counsel's performance had been deficient and, having found deficient performance, whether it resulted in prejudice to Respondent Richey." Opp. at 22. That is, of course, the traditional *Strickland* analysis *on direct review*. At this point in his brief, then, because Richey insists that the Sixth Circuit made the full AEDPA analysis, one would expect him to seize the opportunity and explain at length the Sixth Circuit's "unreasonable application" analysis. But he does not do so because that analysis does not exist. Instead, Richey's very next sentence parrots the Sixth Circuit's belated conclusion that "the state court's conclusion to the contrary was unreasonable." *Id.* (quotation marks omitted). In other words, given the opportunity to rebut our primary argument that the Sixth Circuit failed to conduct an "unreasonable application" analysis, Richey offers silence.

Bell v. Cone—a case that Richey never cites, much less distinguishes—provides the better analysis and shows why Richey is wrong on his view of the Sixth Circuit's decision. 535 U.S. 685 (2002). Indeed, the Sixth Circuit's decision in *Cone v. Bell*, 243 F.3d 961 (6th Cir. 2001), (which the Court later reversed) has an AEDPA analysis with all the features that Richey praises in the circuit's decision here. In *Cone v.*

Bell, the Sixth Circuit recited the AEDPA standard, *id.* at 967–68, cited the state court opinions, *id.* at 976, conducted an "analysis," *id.* at 976–79, and concluded that the state court decision was "unreasonable," *id.*

None of this, however, saved *Cone v. Bell* from reversal for the same reason that requires reversal here: The lower court in *Bell* failed to give appropriate deference to the state court decision. As the Court said in *Bell*, a petitioner must do more than "convince a federal habeas court that, in its independent judgment, the state-court decision applied *Strickland* incorrectly." 535 U.S. at 699. The *Bell* petitioner failed to do so, and that is also true here. But instead of tackling *Bell v. Cone* head-on, Richey dodges it with silence. Indeed, the only case he even attempts to distinguish, *Price v. Vincent*, 538 U.S. 634 (2004), see Opp. at 22, is one selectively plucked from a string citation in Ohio's petition.

With nothing substantive left to say on the point, Richey resorts to attacking Ohio for "repeated misrepresentations of the record in this case." Opp. at 23. But Ohio's discussion of the dissenting opinion below is no "misrepresentation." Judge Siler in dissent relied on the Court's *Bell* decision in emphasizing that habeas petitioners must do more than show that they have a *Strickland* claim—they must also establish that the state court's decision to the contrary was unreasonable. App. 58a. Judge Siler showed that Richey could not meet this standard, and the reasonable inference is that he believed the majority applied a different one in granting Richey relief.

Nor is Richey correct in faulting Ohio for not including the belated phrase "the state court's conclusion to the contrary was unreasonable" in the Appendix opinion. Opp. at 22 n.6. According to the Sixth Circuit docket, the panel never issued an amended opinion in Richey's case. To be sure, some three months after issuing its opinion, the panel entered a separate order stating that it "had added" the "unreasonable

application" sentence to the opinion (as the petition noted, see Pet. at 24; App. 61a). But the court never bothered to issue an amended opinion—a fact that underscores how much of an afterthought the Sixth Circuit's passing reference to the AEDPA standard really was.

Lastly, Richey asks the Court to ignore the AEDPA standard in deciding whether to grant certiorari. He says that Ohio "only attacks the Sixth Circuit's decision as not giving the necessary deference to the state court." Opp. at 24. Precisely so. AEDPA *requires* deference, limiting relief to "objectively unreasonable" decisions. The court below failed to abide that limitation, a decision that, left uncorrected, will seriously compromise the entire habeas framework.

Perhaps recognizing the weakness of his assertion that the Sixth Circuit followed AEDPA, Richey half-heartedly claims that de novo review of the state court decision may be appropriate. See *id.* at 23 (citing *Holland v. Jackson*, 124 S.Ct. 2736 (2004)). Capitalizing on assumptions and dicta about what some lower courts do in a narrow class of habeas cases, Richey believes that deference to state courts "may not even" be necessary in his case. *Id.* But he is wrong.

De novo review is appropriate in, at most, two circumstances: (1) where the state court has not ruled on a claim (and, even then, only when the petitioner can overcome procedural default), and perhaps (2) where the federal court bases its decision on new evidence, and the petitioner can show that he was not at fault for failing to present the evidence in state proceedings. See 28 U.S.C. § 2254(e)(2); *Williams v. Taylor*, 529 U.S. 420 (2000). Richey can show neither circumstance.

Richey has never even claimed that the first category applies, and the Sixth Circuit expressly held that Richey had presented his claim to state court (as otherwise the claim would have been procedurally defaulted). App. 39a. And, as for the second category, all of the "evidence" that Richey

(and the Sixth Circuit) cites was "evidence" that Richey could have presented, but did not, in state court. The key assertion underlying Richey's ineffective assistance claim in federal court was his assertion that DuBois (Richey's expert) was unqualified and that Richey's counsel should have known that. But Richey does not show when or where he sought to introduce evidence in state court regarding DuBois' lack of qualifications. And the fact is Richey did not seek to do so, as in state court he was not attacking DuBois' qualifications. According to the state court that heard his ineffective assistance claim, "Richey does not allege that Mr. DuBois was not qualified to render an expert opinion." App. 350a. Thus, it was Richey's own choices about how to frame his claim, not the lack of a state evidentiary hearing, that determined the content of the evidentiary record. Further confirming this, all of the evidence Richey presented in federal court—evidence about DuBois and Richey's trial counsel—was available to Richey at the time of his state postconviction proceedings, as both DuBois and Richey's counsel were cooperating with Richey during those proceedings.

Richey cannot have it both ways. If he did not argue in state court that DuBois was unqualified, he is procedurally defaulted from asserting that now. And if he did make that claim in state court, he cannot now add facts that he could have presented, but didn't, in state court.

Ultimately, none of Richey's red herrings can divert from the fact that the Sixth Circuit embarked on its own ineffective-assistance analysis, complete with new findings of fact and *de novo* legal review, in direct contravention of AEDPA's strictures. That framework error warrants the Court's attention.

CONCLUSION

For all of the above reasons, Ohio urges the Court to grant Ohio's petition and reverse the Sixth Circuit's decision.

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No. 05-101

IN THE
Supreme Court of the United States

MARGARET BRADSHAW, WARDEN,

Petitioner,

v.

KENNETH T. RICHEY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR REHEARING

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Respondent Kenneth Richey respectfully petitions the Court for a rehearing on its November 28, 2005 Order summarily reversing in part, and remanding in part, the decision of the Court of Appeals for the Sixth Circuit in his capital case. See *Bradshaw* v. *Richey*, 546 U.S. ___ (2005) (No. 05-101) (*per curiam*). This Court remanded Richey's petition for a writ of habeas corpus to the Sixth Circuit to determine whether "the State failed to preserve its objection to the Sixth Circuit's reliance on evidence not presented in state court by failing to raise this argument properly before the Sixth Circuit." Slip Op. at 6. Such a remand is unnecessary. Full review of the record would have demonstrated that the state's waiver of this argument was explicit and that the district court found, without objection or appeal, that Richey had been diligent in seeking to develop the factual record in state court. Moreover, in discussing issues concerning procedural default and exhaustion not presented by the state's petition for a writ of certiorari, this Court made statements that were either outright inconsistent with the record or could be misinterpreted as deciding issues for which the complete record was not presented in the appendix or analyzed by the parties. This Court further erred in substituting its judgment to interpret an Ohio statute differently than the Ohio courts or by either party, and therefore without any briefing on the propriety of that interpretation. For these reasons, this Court should grant the petition for rehearing, vacate the decision of November 28, 2005, and either (1) deny the State's petition for writ of certiorari or (2) grant the petition to allow for full development of the record before issuing a decision.

Reasons to Grant Rehearing

I. The State Did Not Preserve Its Argument Under *Holland* v. *Jackson*

The first reason this Court should grant Respondent's petition for rehearing and vacate the November 28 Order is the Court's incorrect conclusion that the Court of Appeals "erred" in failing to perform the analysis required by *Holland* v. *Jackson*, 542 U.S. 649 (2004) (*per curiam*), when considering evidence relevant to Richey's ineffective assistance of trial counsel claim that was not first presented to the state habeas courts:

> the Sixth Circuit erred in its adjudication of this claim by relying on evidence that was not properly presented to the state habeas courts without first determining (1) whether respondent was at fault for failing to develop the factual bases for his claims in state court, see *Williams* v. *Taylor*, 529 U.S. 420, 430–432 (2000), or (2) whether respondent satisfied the criteria established by 28 U.S.C. §2254(e)(2). See *Holland* v. *Jackson*, 452 U.S. 649, (2004) (*per curiam*).

Bradshaw, Slip Op. at 5.

The state expressly waived any argument concerning whether the federal courts could properly consider evidence not presented in state court, and the federal district court held that such evidence could be considered. Before the district court, both Richey and the state were granted permission to take discovery. Following completion of that discovery, Richey sought an evidentiary hearing. Although *Williams* v. *Taylor*, 529 U.S. 420 (2000), had not yet been decided, Richey explicitly argued that "[b]ecause Richey sought to develop and present his evidence in an evidentiary hearing before the state courts, 28 U.S.C. § 2254(e)(2) does not apply to this case." App. 41a (Memorandum in Support of Petitioner's

Motion for an Evidentiary Hearing). In opposing the request on other grounds, the state conceded that Richey had been diligent in state court. "Even so, we agree that 28 U.S.C. §2254(e)(2) does not bar an evidentiary hearing in this case. And Richey is correct that even if he does not demonstrate *entitlement* to an evidentiary hearing, this Court may nonetheless retain discretion to order one." App. 85a (Respondent's Memorandum in Response to Richey's Motion for an Evidentiary Hearing) (emphasis added).

Based upon the evidence, the district court held Richey had been diligent:

> Although the [state] post-conviction court refused to grant Richey a hearing, Richey did attempt to develop the factual basis for his claims in state court. Thus, according to prevailing law, Richey is not barred from obtaining an evidentiary hearing.

App. 93a (Order Denying Motion for Evidentiary Hearing). The state never contested or appealed this ruling and never even cited section 2254(e)(2) in its brief to the Sixth Circuit. Because of this concession at the district court, the Sixth Circuit did not "err" in failing to consider explicitly whether this evidence could be considered. Rather, the state explicitly conceded, and the district court explicitly held, that Richey was ***not*** at fault, and the issue was never again raised until the state petitioned this Court for a writ of certiorari.

Accordingly, there is no need to remand the ineffective assistance of counsel issue to the Court of Appeals. This Court should vacate the November 28 Order and either deny the petition for writ of certiorari, or, in the alternative, grant the writ and order briefing on the merits.

II. This Court Misread the Record Below

The second reason this Court should grant Respondent's petition for rehearing and either vacate or amend the November 28 Order is the Court's misreading of the record below, when discussing whether Respondent had procedurally defaulted arguments relied upon by the Court of Appeals in finding ineffective assistance of counsel. The per curiam order states that:

> the Sixth Circuit erred in relying on certain grounds that were apparent from the trial record but not raised on direct appeal— namely that trial counsel (1) inadequately cross-examined experts called by the State, (2) erred by prematurely placing the forensic expert counsel had hired on the witness list, and (3) failed to present competing scientific evidence against the State's forensic experts— without first determining whether respondent's procedural default of these subclaims could be excused by a showing of cause and prejudice or by the need to avoid a miscarriage of justice. See App. to Pet. for Cert. 340a–341a, 351a–354a (state courts' holding that these subclaims should have been raised on direct appeal); *id.*, at 109a–110a (District Court's holding that this default was not excusable under *Coleman* v. *Thompson*, 501 U. S. 722, 749–750 (1991)).

Bradshaw, Slip Op. at 6.

The cited portions of the record, however, do not support this statement. The citation to the district court's opinion is to a discussion of Respondent's claim of ineffective assistance of appellate, not trial, counsel. See App. to Pet. for Cert. at 107a–110a. The district court never found that the three specified grounds for ineffective assistance of trial

counsel were defaulted; to the contrary, it explicitly held that the first and third grounds were not defaulted. See *id.* at 186a n.42, 188a–89a, 192a-94a. And while the district court did find that the second specified ground for ineffective assistance of trial counsel was defaulted, see *id.* at 186a n.42, 189a, the Court of Appeals concluded that this finding was incorrect, see *id.* at 38a-39a, and the dissent below went out of its way to note that the ineffective assistance issue "was not procedurally defaulted." *Id.* at 54a. Moreover, nowhere in the cited portion of the record (and nowhere else besides) did any State court find the specified subclaims to be defaulted. See *id.* at 341a, 351a-54a. Tellingly, in the petition for writ of certiorari the State concedes that Richey's ineffective assistance of counsel argument was presented to the state courts. See Reply Brief for the Petitioner at 9.

Accordingly, because these specified grounds for finding ineffective assistance of counsel were not defaulted in state court, the Court of Appeals did not commit error in relying upon them. At the very least, this Court should grant the petition for rehearing and amend its November 28 Order to remove the language quoted above, which could have significant consequences on the course of proceedings on remand.

III. This Court Adopted a Novel Interpretation of Ohio Law

Respondent further requests that this Court reconsider that portion of its per curiam ruling that summarily reversed the Court of Appeals on the sufficiency of the evidence used to convict Respondent. This Court erroneously substituted its own interpretation of the Ohio aggravated felony-murder statute for the interpretation of the Ohio Court of Appeals, the highest court of Ohio to have addressed the relevant statutory language.

In 1986 when Richey was convicted, Ohio had two aggravated murder statutes: O.R.C. § 2903.01(A) for premeditated murder and § 2903.01(B) for felony murder. Richey was charged and convicted only under section 2903.01(B). This Court recognized that the critical language on transferred intent appears in O.R.C. § 2903.01(D) (quoting it in its entirety), which by its express terms applies only to prosecutions under section (B), (not section (A)) and requires proof that the defendant intended to cause the death "of the person killed," thus eliminating transferred intent. The Ohio Supreme Court has never applied the relevant section (D) provision, but the Ohio Court of Appeals has expressly ruled that the very language interpreted by this Court to permit Richey's conviction on a transferred intent theory actually prohibits conviction on a transferred intent theory. *State* v. *Mullins*, 76 Ohio App. 3d 633, 602 N.E.2d 769 (1992). And that holding follows from the Ohio Supreme Court's dictum in *State* v. *Sowell*, 39 Ohio St. 3d 322, 530 N.E.2d 1294 (1988), upholding a conviction under section (A) based on transferred intent because section (D) does not limit convictions under section (A), only under section (B).

The State argued, and this Court apparently agreed, that when the Ohio Supreme Court upheld Richey's conviction 4-3, it implicitly resolved the issue by ruling that transferred intent would support a conviction under section (B). But it is undisputed that the argument about section (D) was not addressed in the briefing or argument, and the Ohio Supreme Court did not mention section (D), or *Mullins*, or even the *Sowell* dictum that distinguished the intent required under sections (A) and (B). In light of this history, *Mullins* remains the only Ohio appellate decision to interpret and apply section (D), and the Sixth Circuit properly deferred to that state court's interpretation of state law — particularly where it was consistent with the Ohio Supreme Court's dictum in *Sowell*

and where the Ohio Supreme Court declined to resolve the issue itself when the Sixth Circuit certified the question.[1] See *Bush* v. *Palm Beach County Canvassing Bd.*, 531 U.S. 70, 76 (2000) (*per curiam*); *Bush* v. *Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring). Because it was inconsistent with this Court's precedents and practice to substitute its own interpretation of section (D) — an interpretation not suggested by the State nor ever mentioned by any Ohio court—for that of the Ohio courts, and to assume that the Ohio Supreme Court must have decided an issue that was neither briefed nor argued nor actually mentioned in its opinion, Respondent Richey respectfully requests that the Court reconsider its decision and reinstate the Sixth Circuit's ruling that Richey's conviction on a theory of transferred intent cannot stand. In the alternative, Respondent requests that the Court reconsider its summary reversal and grant certiorari on the issue to permit a further consideration of the issue after full briefing and argument.

Conclusion

For the foregoing reasons, Respondent respectfully requests the Court grant his petition for rehearing, vacate the November 28 Order, and either deny the petition for writ of certiorari; reissue an order correcting this Court's misreading of the record with respect to Respondent's supposed procedural defaults; or grant the petition for writ of certiorari and order briefing on the merits.

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[1] The case cited by this Court for its interpretation of section 2903.01(D), *State* v. *Phillips*, 74 Ohio St. 3d 72, 100, 656 N.E.2d 643, 668 (1995), was not cited by Petitioner or the dissent below and for good reason; it does not discuss whether transferred intent is an available theory for aggravated felony-murder.

Respectfully submitted,

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As counsel for the respondent, I hereby certify that this petition for rehearing is presented in good faith and not for delay.

/s/ Kenneth J. Parsigian
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APPENDIX TABLE OF CONTENTS

PAGE

Memorandum in Support of Petitioner's Motion for an Evidentiary Hearing 1a

Respondent's Memorandum in Response to Richey's Motion for an Evidentiary Hearing.....46a

Order Denying Motion for Evidentiary Hearing 87a

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

KENNETH T. RICHEY,	:	
Petitioner,	:	CIVIL ACTION
v.	:	NO. 1:98 CV 1418
BETTY MITCHELL, Warden,	:	
Respondent.	:	

Memorandum in Support of Petitioner's Motion for an Evidentiary Hearing

TABLE OF CONTENTS

I. Richey is Entitled to An Evidentiary Hearing to Present His New Scientific Evidence Demonstrating the Falsity of the Scientific Evidence Relied Upon at His Trial 2
A. Richey's Substantive and Procedural Claims of Actual Innocence Require an Evidentiary Hearing 3
B. Richey's Claim of Ineffective Assistance of Trial Counsel Requires an Evidentiary Hearing to Resolve Disputes Concerning the Scientific Evidence of Arson....6
C. Significant Factual Disputes Exist Concerning the Scientific Evidence of Arson 8

II. This Court Must Consider New Evidence Raising Questions Concerning the Reliability of Trial Testimony at an Evidentiary Hearing 15
A. The Fire and the Initial Investigation 16
B. Identification of Richey as the Prime Suspect 19
C. The Evidence Concerning Arson 22
D. Actions of Defense Counsel....29
E. The Trial 33
F. The Direct Appeal 34

III. At Least, the Court Should Exercise its Discretion and Hold an Evidentiary Hearing 35

IV. Although the Respondent May Argue to the Contrary, 28 U.S.C. § 2254(e)(2) Does Not Prohibit an Evidentiary Hearing in this Case 36
A. 28 U.S.C. § 2254(e)(2) Does Not Bar Richey's Evidentiary Hearing Because Richey Sought to Develop and Present These Facts Before the State Courts 37

Conclusion 41

TABLE OF AUTHORITIES

FEDERAL CASES

Bousley v. United States, 523 U.S. 614 (1998) 6

Burris v. Parke, 116 F.3d 256 (7th Cir. 1997).....38

Cardwell v. Greene, 152 F.3d 331 (4th Cir.)
cert. denied, __U.S.__, 119 S. Ct. 587 (1998) 38, 39, 40

Foster v. Lockhart, 9 F.3d 722 (8th Cir. 1993) 7

Glenn v. Tate, 71 F.3d 1204 (6th Cir. 1995) 6, 7, 8

Herrera v. Collins, 506 U.S. 390 (1993).....3

Jones v. Wood, 114 F.3d 1002 (9th Cir. 1997) 38

Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992).....1, 38

Love v. Morton, 112 F.3d 131 (3d Cir. 1997) 38

Mapes v. Coyle, 171 F.3d 408 (6th Cir. 1999) 16

McDonald v. Johnson, 139 F.3d 1056 (5th Cir. 1998) 38

Miller v. Champion, 161 F.3d 1249 (10th Cir. 1998) 38

Murray v. Carrier, 477 U.S. 478 (1986) 4

Schlup v. Delo, 513 U.S. 298 (1995) 4, 5, 6, 15

Sims v. Livesay, 970 F.2d 1575 (6th Cir. 1992) 7, 8, 15

Siripongs v. Calderon, 35 F.3d 1308 (9th Cir. 1994),
cert. denied, 513 U.S. 1183 (1995).....36

Strickland v. Washington, 466 U.S. 668 (1984) 6

Townsend v. Sain, 372 U.S. 293 (1963) 1, 5, 36, 38

Zilich v. Reid, 36 F.3d 317 (3d Cir. 1994).....5

FEDERAL STATUTES

28 U.S.C. § 2254(e)(2) 2, 36, 37

The factual record developed by Petitioner Kenneth T. Richey ("Richey") in this case, in combination with the controlling law, requires that this Court permit Richey to present evidence at an evidentiary hearing. The law requires an evidentiary hearing because Richey has presented facts which, if accepted as true, demonstrate that he is entitled to relief.

> Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding. In other words, a federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing reliably found the relevant facts.

Townsend v. Sain, 372 U.S. 293, 312-13 (1963).

Because the state post-conviction court refused to hold an evidentiary hearing to consider Richey's substantial new evidence, an evidentiary hearing before this Court is required. In further defining this standard, the Supreme Court enunciated a non-exhaustive list of six situations requiring an evidentiary hearing:

> We hold that a federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not

> afford the habeas applicant a full and fair fact hearing.

Id. at 313.[1] Because Richey meets all six factors, an evidentiary hearing is required.

1. Richey is Entitled to An Evidentiary Hearing to Present His New Scientific Evidence Demonstrating the Falsity of the Scientific Evidence Relied Upon at His Trial.

At the very least, Richey is entitled to an evidentiary hearing to present his new evidence concerning the falsity of the scientific evidence that the trial court relied upon to convict him. At trial, three witnesses testified on behalf of the State in support of the conclusion, allegedly based upon scientific analysis, that the fire at Hope Collins' apartment on June 30, 1986, was caused by arson. Assistant State Fire Marshal Robert Cryer testified that in his inspection of the apartment, he identified three characteristics which he testified were exclusively caused by ignitable liquids. Trial Testimony, Robert Cryer, Petitioner's Checklist, Tab 3, at 760. Daniel Gelfius, a technician with the Ohio Arson Crime Laboratory ("OACL"), testified that three of the nine samples provided by Cryer for testing at the OACL contained ignitable liquids — a piece of carpet and wood from the deck contained paint thinner and another piece of carpet contained gasoline. Trial Testimony, Dan Gelfius, Petitioner's Checklist, Tab 3, at 836. Finally, L. Gregory DuBois, who was originally retained by Richey's counsel to analyze the evidence of arson, testified

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[1] The Supreme Court has since modified the fifth *Townsend* factor, requiring a petitioner to demonstrate cause and prejudice for his failure to develop facts in state court. *See Keeney v. Tamayo-Reyes*, 504 U.S. 1, 5-12 (1992). Congress has since further modified this standard. *See* 28 U.S.C.A. § 2254(e)(2) (West Supp. 1999).

that he concurred with the testimony of the State's witnesses despite the fact that he had not conducted his own analysis of the evidence. Trial Testimony, Gregory DuBois, Petitioner's Checklist, Tab 3, at 821.

Richey's new scientific evidence includes the affidavits of Professor Richard L. P. Custer, a nationally recognized fire investigator, and Andrew T. Armstrong, Ph.D., a Certified Professional Chemist specializing in forensic science and the testing, detection, and identification of flammable liquids in fire debris. The affidavit of Professor Custer establishes that, according to sound scientific principles, none of the physical evidence relied upon by Cryer is in fact evidence of arson. Indeed, Professor Custer concludes that the evidence actually supported a conclusion that the most likely cause of the fire was the careless discard of smoking materials. The affidavit of Dr. Armstrong establishes that, contrary to the conclusions of the Ohio Arson Crime Laboratory, none of the samples of debris taken from the fire scene contain evidence of an ignitable liquid according to current scientific criteria, or even according to the less accurate standards used by the Ohio Arson Crime Laboratory in 1987. Despite Richey's attempt to present his new evidence to the state court during post-conviction proceedings, that court refused to hold an evidentiary hearing. To date, no court has heard, let alone ruled on, Richey's new evidence.

Resolving the conflicts concerning the scientific testimony of arson is an essential prerequisite for this Court to rule upon Richey's legal claims. For example, Richey has presented to this Court claims of (1) actual innocence and (2) ineffective assistance of trial counsel, and neither issue can be decided without resolving the conflicts about the scientific testimony of arson.

A. Richey's Substantive and Procedural Claims of Actual Innocence Require an Evidentiary Hearing.

In his Petition, Richey states that he is being unconstitutionally detained because he is actually innocent of the crime for which he sits on death row. *See Herrera v. Collins*, 506 U.S. 390, 418, 419, 430 (1993) (O'Connor, J., concurring, joined by Kennedy, J., and Blackmun, J., dissenting, joined by Stevens and Souter, JJ.). The Petition also makes clear that Richey relies upon actual innocence not only as a substantive claim, but also as a procedural gateway to avoid any procedural bars raised by the State to consideration of any of Richey's substantive claims. *See Schlup v. Delo*, 513 U.S. 298, 313-17 (1995). To resolve Richey's substantive and procedural claims of actual innocence, this Court must hear live, in-person testimony from witnesses concerning the scientific evidence of arson.

The Supreme Court has noted the need for a district court to hold an evidentiary hearing to consider new evidence of actual innocence. A credible claim of actual innocence necessarily requires the presentation of new evidence. "To be credible, such a claim [of actual innocence] requires petitioner to support his allegations of constitutional error with new reliable evidence — whether it be ***exculpatory scientific evidence***, trustworthy eyewitness accounts, or critical physical evidence — that was not presented at trial." *Id.* at 324 (emphasis added). To succeed on his procedural claim of actual innocence, Richey "must show that it is more likely than not that no reasonable juror would have found [him] guilty beyond a reasonable doubt [in light of the new evidence]." *Id.* at 327.[2] As the Supreme Court has made clear,

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[2] To succeed on his substantive claim of actual innocence, Richey must demonstrate that his new evidence "unquestionably establish[es]" his innocence. *Schlup*, 513 U.S. at 317.

this determination must be made based not only on the evidence presented at trial, but also on any new evidence obtained by the Petitioner.

> [T]he emphasis on "actual innocence" allows the reviewing tribunal also to consider the probative force of relevant evidence that was either excluded or unavailable at trial. Indeed, with respect to this aspect of the [*Murray v. Carrier*, 477 U.S. 478 (1986)] standard, we believe that Judge Friendly's description of the inquiry is appropriate: The habeas court must make its determination concerning the petitioner's innocence "in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after trial."

Id. at 327-28.

In making this determination, the habeas court is empowered, indeed required, to make credibility determinations. "[U]nder the gateway standard... the newly presented evidence may indeed call into question the credibility of the witnesses presented at trial. In such a case, the habeas court may have to make some credibility assessments." *Id.* at 330. Such credibility determinations can only be made at an evidentiary hearing where the witnesses in question testify before the district court.

> Where an unresolved factual dispute exists, demeanor evidence is a significant factor in adjudging credibility. And questions of credibility, of course, are basic to resolution of conflicts in testimony. To be sure, the state-court record is competent evidence, and either party may choose to rely solely upon the evidence contained in that record, but the petitioner, and the State, must be given

> the opportunity to present other testimonial and documentary evidence relevant to the disputed issues.

Townsend, 372 U.S. at 322 (internal citation omitted); *see also Zilich v. Reid*, 36 F.3d 317, 32123 (3d Cir. 1994) (requiring evidentiary hearing to resolve credibility issues in federal habeas petition). In *Schlup*, for example, the Supreme Court remanded with implicit instructions to hold an evidentiary hearing.

> The fact-intensive nature of the inquiry, together with the District Court's ability to take testimony from the few key witnesses if it deems that course advisable, convinces us that the most expeditious procedure is to order that the decision of the Court of Appeals be vacated and that the case be remanded to the Court of Appeals with instructions to remand to the District Court for further proceedings consistent with this opinion.

Schlup, 513 U.S. at 332;[3] *see also Bousley v. United States*, 523 U.S. 614, 623 (1998) (remanding case to the district court

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[3] Even the three Justices who dissented in *Schlup* would grant an evidentiary hearing on the facts presented in this case:

> But in the highly unusual case where the district court believes on the basis of written submissions that the necessary showing of "actual innocence" may be made out, it should conduct a limited evidentiary hearing at which the affiants whose testimony the court believes to be crucial to the showing of actual innocence are present and may be cross-examined as to veracity, reliability, and all of the other elements that affect the weight to be given the testimony of a witness. After such a hearing, the district court would be in as good a position as possible to make the required determination as to the showing of actual innocence.

Schlup, 513 U.S. at 341-42 (Rehnquist, C.J., dissenting, joined by Kennedy & Thomas, JJ.).

to allow Petitioner "to attempt to make a showing of actual innocence" sufficient to allow Petitioner to go through *Schlup*'s procedural gateway).

B. Richey's Claim of Ineffective Assistance of Trial Counsel Requires an Evidentiary Hearing to Resolve Disputes Concerning the Scientific Evidence of Arson.

An evidentiary hearing to consider new evidence concerning the scientific evidence of arson is similarly required to resolve Richey's claim of ineffective assistance of trial counsel. To demonstrate ineffective assistance of counsel, Richey must meet the standard enunciated in *Strickland v. Washington*, 466 U.S. 668, 687-88, 692 (1984).

> To obtain relief on such a ground, he must show both that his counsel's performance "fell below an objective standard of reasonableness" and that he was prejudiced as a result.

Glenn v. Tate, 71 F.3d 1204, 1206 (6th Cir. 1995) (quoting *Strickland*, 466 U.S. at 687-88). An evidentiary hearing at which Petitioner presents scientific evidence concerning arson is required to allow Richey to demonstrate both the unreasonableness of counsel's actions and the prejudice that resulted.

As to the reasonableness of the actions of Richey's trial counsel, Richey maintains that trial counsel did not adequately investigate the State's alleged scientific evidence of arson and that, had counsel reasonably investigated, he would have uncovered evidence demonstrating the falsity of the state's evidence of arson. *See Foster v. Lockhart*, 9 F.3d 722, 726 (8th Cir. 1993) ("If the attorney had investigated further, he would have discovered objective medical evidence casting substantial doubt on the victim's story, and witnesses who could confirm the medical evidence."). Moreover,

counsel failed adequately to inform and work with the expert he did obtain. *See Glenn*, 71 F.3d at 1210 n.5 ("[D]efense counsel should obviously have worked closely with anyone retained as a defense expert to insure that the expert was fully aware of all facts that might be helpful to the defendant.").

The Sixth Circuit has recognized that in analyzing the reasonableness of trial counsel's actions, the court should consider the evidence developed by counsel during post-conviction proceedings; such evidence serves as a baseline to establish what effective counsel could have developed at trial. *See Glenn*, 71 F.3d at 1208 (analyzing the reasonableness of counsel's actions, and observing that "[i]f the lawyers had done what they should have done, they would have been in a position to show the jury" all the evidence developed by post-conviction counsel). Moreover, where, as here, this evidence includes expert testimony, the proper forum for receiving the evidence is an evidentiary hearing. *Id.* (noting that expert testimony had been adduced at post-trial hearing); *Sims v. Livesay*, 970 F.2d 1575, 1577-79 (6th Cir. 1992) (district court held "bench trial" on habeas petition at which petitioner presented two expert witnesses); *Foster*, 9 F.3d at 725 (expert testimony demonstrating facts trial counsel failed to develop presented in evidentiary hearing).

This Court must further resolve disputes concerning the scientific evidence of arson to determine whether Richey can demonstrate prejudice in connection with his claim of ineffective assistance of counsel. "Under the *Strickland* test, the petitioner must show a 'reasonable probability' that, but for his counsel's unprofessional errors, the result would have been different. ... The 'reasonable probability' of which Strickland speaks ... is 'a probability sufficient to undermine confidence in the outcome.'" *Glenn*, 71 F.3d at 1210 (quoting *Strickland*, 466 U.S. at 694). To assess this "reasonable probability," this Court must determine whether Richey has

raised sufficient questions concerning the evidence presented against him at trial, with special focus on the scientific evidence of arson. The Sixth Circuit has noted the propriety of considering new scientific evidence through an evidentiary hearing in determining the prejudice prong of the *Strickland* test. *See Sims*, 970 F.2d at 1581 (analyzing scientific evidence, including testimony of petitioner's new expert at evidentiary hearing, to determine that prejudice prong of *Strickland* had been met).

C. Significant Factual Disputes Exist Concerning the Scientific Evidence of Arson.

Significant factual disputes exist concerning the scientific evidence of arson in this case. As noted above, the State presented three witnesses to testify concerning the scientific evidence of arson at Richey's trial: Cryer, Gelfius and DuBois. Prior to his first state post-conviction petition, Richey retained qualified experts to review the evidence presented against him at trial: Dr. Andrew Armstrong, a forensic scientist with a specialty in the identification of ignitable liquids from fire debris, and Professor Richard Custer, a nationally-recognized expert in fire reconstruction and the determiiiation of cause and origin of fires. Affidavits of these experts were initially presented to the courts for the State of Ohio in Richey's Motion to Vacate or Set Aside Sentence. These affidavits have been provided to this Court as Exhibits 1 and 2 to the Petition for a Writ of Habeas Corpus (the "Petition").

Dr. Armstrong's review of the evidence reveals that the OACL incorrectly determined that the samples taken from the apartment of Hope Collins contained ignitable liquids. Specifically, Dr. Armstrong avers that *none* of the three samples tested by the OACL can be conclusively identified as containing ignitable liquids. *See* Armstrong Affidavit, ¶¶ 14-19 (Exhibit 2 to the Petition). Dr. Armstrong further raises

significant questions concerning the scientific methods utilized by the OACL in its analysis of fire debris. *Id.* at 120.

Similarly, after reviewing all of the evidence relied upon by Mr. Cryer, Professor Custer concluded that the indicia of arson testified to by Mr. Cryer are in fact not evidence of ignitable liquids but can instead be the result of an accidental apartment fire. *See* Custer Affidavit, ¶10 (Exhibit 1 to the Petition). Professor Custer has further opined that, given all of the evidence presented in this case, the fire at Hope Collins' apartment more likely than not was accidental, started by either child's match play or the careless discard of smoking materials.[4] *Id.* at ¶¶ 12-13. Finally, after reviewing the evidence about the smoke detector and running computer simulations of the fire, Professor Custer has concluded that the smoke detector may likely have melted during the fire and thus fallen from the ceiling. *Id.* at ¶ 12(e).

In discovery in this federal habeas action, Richey has further developed evidence that calls into question the conclusions relied upon to convict him. Much of the discovery in this habeas proceeding has focused on the State's "scientific" testimony about arson. Richey has deposed the OACL, through its designees Mohamed Gohar and Daniel Gelfius, the Assistant State Fire Marshal, Robert Cryer,[5] and the expert initially obtained by Richey's trial defense team,

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[4] There is significant evidence of both Cynthia Collins' history of playing with fire and Hope Collins' history of careless discard of smoking materials to support either of these scenarios. *See, e.g.*, Exhibit 1, Hope [Collins] Sterling Deposition, June 23, 1999, ("Collins Deposition") at 55-56, 78-80.

[5] Although Mr. Cryer would possess important information, his deposition reveals that he has little or no memory of the investigation in this case. Exhibit 3, Robert Cryer Deposition, June 16, 1999 ("Cryer

Gregory DuBois. The Respondent has deposed both Dr. Armstrong and Professor Custer. Furthermore, the Respondent designated Mr. Gohar as an expert for these proceedings and provided a report. In his report, Mr. Gohar specifically challenges the conclusions of Dr. Armstrong and proclaims Dr. Armstrong's statements to be "false." *See* Exhibit 2, Affidavit of Mohamed M. Gohar, June 2, 1999. Following his designation and preparation of his report, Mr. Gohar was then deposed in his capacity as Respondent's designated expert.

Discovery has identified many significant factual questions that must be resolved by this Court.[6] For example, discovery has revealed that Cryer presented false testimony at Richey's trial concerning the conclusions of the OACL, yet Richey's trial counsel failed to expose this falsehood. During his trial testimony, Cryer was questioned concerning his beliefs about the reliability of any samples from the carpet in light of its history, i.e., its removal from the apartment, deposit at the county landfill, recovery by the Sheriff's Department and placement in the parking lot near the gasoline pumping station before any samples were taken. Trial Testimony, Robert Cryer, Petitioner's Checklist, Tab 3, at 792-93, 806. Cryer testified that, although this history raised some question about the reliability of findings from the carpet samples, any questions were allayed by his belief that the OACL identified the same paint thinner on both the carpet

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Deposition"), at 26-31. Therefore, although Petitioner would generally seek to present all relevant participants in an evidentiary hearing, Petitioner acknowledges that the testimony of Mr. Cryer would be without value.

[6] The listing of factual disputes herein is not comprehensive, but is merely intended to demonstrate the variety and types of questions this Court will need to resolve concerning the scientific evidence of arson.

and the deck, thus confirming the reliability of the carpet samples. Trial Testimony, Robert Cryer, Petitioner's Checklist, Tab 3, at 806. Discovery, however, has disclosed that Cryer's belief about the OACL findings was simply wrong. Both Mohamed Gohar and Dan Gelfius testified that as of 1986, and today, the OACL *could not* and *did not* identify the paint thinner on the deck and on the carpet as the same. *See* Exhibit 4, Mohamed Gohar Deposition ("Gohar Deposition"), vol. III, June 15, 1999, at 338; Exhibit 5, Dan Gelfius Deposition ("Gelfius Deposition"), vol. II, June 17, 1999, at 204-05. Thus, crucial evidence presented at trial about the reliability of central physical evidence against Richey was demonstrably false according to the State's own witnesses, yet the falsity of this evidence was not exposed to the trial court.

Other disputes concern the reliability and scientific propriety of the methods and equipment utilized by the OACL. The OACL identifies ignitable liquids in gas chromatographs, generated through the use of a packed column, on the basis of "pattern recognition." Exhibit 6, Gohar Deposition, vol. I, May 25, 1999, at 35-36. That is, the technician compares the pattern obtained from testing a sample of fire debris with known patterns obtained from ignitable liquids to determine whether a sufficient match exists to decide that the ignitable liquid is present in the fire debris. *Id.*

However, the standard utilized by the OACL to determine that a sufficient match exists is scientifically unacceptable. Thus, the OACL does not rely upon the scientifically accepted portion of the gas chromatograph to identify gasoline. *Compare* Exhibit 7, American Society for Testing and Materials Standard E 1387-95, "Standard Test Method for Ignitable Liquid Residues in Extracts from Fire Debris Samples by Gas Chromatography," § 10.3.2 (requiring presence of "C3 alkylbenzene four-peak group" for positive

identification of gasoline) (hereinafter "ASTM Standard E 1387-95") *with* Exhibit 4, Gohar Deposition, vol. III, June 15, 1999, at 309-310 ("In 1986, did the laboratory require that the compound in the C3 alkylbenzene group be present in an unknown sample in the same relative concentrations as those same compounds in the C3 alkylbenzene group in a gasoline standard before the laboratory would find that the unknown contained gasoline? A. No."). Moreover, rather than requiring a consistent, matching pattern for positive identification of ignitable liquids, the OACL repeatedly attempts to explain away any differences between the known and unknown samples based on either the accumulation of pyrolytic products or evaporation of more volatile compounds. *See, e.g.*, Exhibit 4, Gohar Deposition, vol. III, June 15, 1999, at 271-74. Although published and generally accepted scientific standards today explicitly note the difficulty of differentiating burned carpet from gasoline, *see* Exhibit 7, ASTM Standard E 1387-95, § 10.3.2.1 ("The mere presence of these alkylbenzenes does not justify an identification of gasoline. The compounds must be present at approximately the same relative concentrations as are observed in samples of known gasoline. Many carpet samples that have been exposed to fire conditions contain these compounds in some concentration."), the OACL continues to insist that its methodologies are superior to any others and that, despite inconsistencies between the OACL and generally accepted methodologies, the OACL results are still reliable, Exhibit 4, Gohar Deposition, vol. III, June 15, 1999, at 278-79, 312; Exhibit 8, Mohamed Gohar Expert Deposition, July 15, 1999 ("Gohar Expert Deposition"), at 61. Furthermore, an important aspect of gas chromatographic data is known as "retention time." Armstrong Affidavit, ¶ 11 (Exhibit 2 to the Petition). Scientific standards require that differences in retention times between known and unknown samples be less than 15 to 20 seconds to positively identify the unknown

sample, Armstrong Affidavit, ¶ 17(e) (Exhibit 2 to the Petition), yet the OACL accepts differences as great as three Exhibit 9, Gohar Deposition, vol. II, May 26, 1999, at 143-44.

Depositions of the two OACL designees have even revealed that Gelfius and Gohar disagree on significant subsidiary facts that led them to their ultimate conclusions about the presence of ignitable liquids in the samples in the Richey case. In depositions, Petitioner asked about the components of the patterns utilized by the OACL to identify paint thinner and gasoline and how each of those necessary components were identified in the fire debris samples from the fire at issue. *See, e.g.*, Exhibit 9, Gohar Deposition, vol. II, May 26, 1999, at 190-93 (identifying peaks necessary to identify paint thinner on Ex. 15A); Exhibit 9, vol. II, at 200-03 (identifying peaks necessary to identify gasoline on Ex. 16); Exhibit 28, Gelfius Deposition, vol. I, June 8, 1999, at 88-89 & 95-96 (identifying peaks necessary to identify paint thinner on Ex. 19); Exhibit 28, vol. I, at 102-03 (identifying peaks necessary to identify gasoline on Ex. 20). Even though Gelfius and Gohar both worked for the same laboratory, they agreed neither on the criteria to apply in identifying the ignitable liquids nor on how to apply those criteria to the samples from the fire at issue. *Compare* Exhibit 36, Fire Marshal Ex. 16 (showing fourteen peaks Gohar requires to identify gasoline pattern) *with* Exhibit 37, Fire Marshal Ex. 20 (showing seventeen different peaks Gelfius requires to identify gasoline pattern); *also compare* Exhibit 38, Fire Marshal Ex. 15A (showing seven peaks Gohar requires to identify paint thinner) *with* Exhibit 39, Fire Marshal Ex. 19 (showing sixteen peaks Gelfius requires to identify paint thinner). Moreover, when asked to find on the gas chromatograph of the fire debris samples the same peaks that they had identified as necessary in the known samples, Gohar and Gelfius identified different peaks as matching the known sample. For example, on the gasoline standards, Mr. Gohar

has numbered as peak 3 the peak corresponding to Mr. Gelfius' numbered peak 17. *Compare* Exhibit 36, Fire Marshal Ex. 16 *with* Exhibit 37, Fire Marshal Ex. 20. When these standards are applied to the unknown sample, however, Mr. Gohar and Mr. Gelfus, while both claiming to identify this peak on the unknown, label completely different peaks as corresponding. *Compare* Exhibit 40, Fire Marshal Ex. 20 (Gohar's identification of peak 3 from the gasoline standard on the unknown he claims to positively identify as gasoline) *with* Exhibit 41, Fire Marshal Ex. 34 (Gelfius identification of his peak 15 from the gasoline standard as corresponding with Gohar's peak 3 and identification of his peak 17 as corresponding with Gohar's peak numbered 1). Thus, although it initially appeared that Gohar and Gelfius reached the same conclusion, as demonstrated by the reports of the OACL submitted as Exhibits at Richey's trial, discovery has now revealed that these conclusions were reached through differing analyses of the underlying data. This inconsistency calls into question the entire analysis performed by the OACL.

Discovery has also revealed the incorrect bases upon which DuBois agreed with the testimony of the state's trial witnesses. DuBois, during his deposition, identified the same mistaken indicia of arson as those relied upon by Assistant State Fire Marshal Cryer during his trial testimony. Exhibit 10, Laurence Gregory DuBois Deposition, June 22, 1999 ("DuBois Deposition"), at 93-95, 140-41. Thus, DuBois testified that burning in the grooves of the deck was necessarily caused by ignitable liquids. *Id.* However, Professor Custer has explicitly explained that such burning can occur in an accidental, apartment fire in which no ignitable liquids exist. Custer Affidavit, ¶¶ 10(b), 12(c)-(e) (Exhibit 1 to the Petition). Similarly, DuBois testified to identifying burn patterns in the living room of the Collins apartment that could only be explained by ignitable liquids. Exhibit 10, DuBois at 94-97. Again, Custer has explained that

a natural phenomenon known as "flashover" can cause such patterns without the presence of ignitable liquids. Custer Affidavit, 1 10(c) (Exhibit 1 to the Petition). When questioned as to the plausibility Custer's analysis, DuBois acknowledged that he was unfamiliar with the concept of flashover. Exhibit 10, DuBois Deposition, at 138-41. Finally, discovery has revealed DuBois's complete lack of qualifications to analyze fire debris and to identify ignitable liquids through gas chromatography. Exhibit 10, DuBois Deposition, at 39, 118-19.

Significant factual disputes concerning the scientific evidence of arson relied upon to convict Richey exist in light of Richey's new evidence. If Richey's scientific evidence is accepted as true, he is entitled to relief. Thus, this Court must allow the presentation of this evidence during an evidentiary hearing.

II. This Court Must Consider New Evidence Raising Questions Concerning the Reliability of Trial Testimony at an Evidentiary Hearing.

Resolution of Richey's legal claims requires consideration of evidence concerning not only the disputed scientific evidence of arson, but the entire record in this case. This Court must consider the evidence presented against Richey at trial and the questions raised concerning that evidence as developed since trial. *See Schlup*, 513 U.S. at 327-28 (stating that court must consider all relevant evidence in deciding question of actual innocence); *Sims*, 970 F.2d at 1581 (stating that the test for prejudice in an ineffective assistance claim is whether the claim raises a "reasonable probability that the jury's verdict would have been different"); *see also Mapes v. Coyle*, 171 F.3d 408, 427-29 (6th Cir. 1999) (remanding for evidentiary hearing on claim of ineffective assistance of appellate counsel). If permitted by this Court, Richey could present the evidence summarized below. To the

extent the Respondent does not contest these facts, Richey is simply entitled to relief based upon them.

A. The Fire and the Initial Investigation[7]

Early in the morning on June 30, 1986, a fire broke out at the apartment of Hope Collins in Columbus Grove, Ohio. Ms. Collins was not home at the time, but her two year old daughter, Cynthia, was home alone. Tragically, Cynthia died in the fire. The Columbus Grove Fire Department responded to the fire at approximately 4:30 a.m. on the morning of June 30, 1986. Trial Testimony, Don Hoyt, Petitioner's Checklist, Tab 3, at 874. Among the members of the Columbus Grove Fire Department who responded were Leonard Heffner, the Chief of the Fire Department, and Steve Stechschulte, who was also a deputy with the Putnam County Sheriff's Department. Exhibit 11, Stechshulte Deposition, July 2, 1999 ("Stechschulte Deposition"), at 17-19; Exhibit 12, Leonard Heffner Deposition, July 1, 1999 ("Heffner Deposition"), at 26-27. After extinguishing the fire, Chief Heffner called the Assistant State Fire Marshal, Robert Cryer, to investigate the fire because a fatality had occurred. Exhibit 12, Heffner Deposition, at 39-40. Before Mr. Cryer arrived, Chief Heffner attempted to determine the cause of the fire. His initial conclusion was that an electric fan had started the blaze. Exhibit 12, Heffner Deposition, at 3536; Exhibit 13, Report Prepared by Heffner, dated June 30, 1986.

At approximately 6:30 a.m., Mr. Cryer arrived and took control of the scene and the investigation. Mr. Cryer headed

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[7] The facts outlined below come from the trial record and discovery obtained in this federal habeas action. Citations to the trial transcript reference the tabs of Petitioner's Checklist. Citations to evidence obtained in discovery reference the Appendix of Exhibits attached to this Memorandum.

the investigation from the Fire Marshal's Office and Deputy Stechschulte investigated any crimes that arose from the fire for the Putnam County Sheriff's Department.[8] Exhibit 11, Stechschulte Deposition, at 79, 84; Exhibit 14, Deputy Roy Sargent Deposition, May 11, 1999 ("Sargent Deposition"), at 128. Mr. Cryer spent much of June 30, 1986, inspecting the remains of the Collins apartment. *See* Trial Testimony, Robert Cryer, Petitioner's Checklist, Tab 3, at 732. The fire and fire-fighting process had caused significant damage to the living room of the apartment, and much debris, including insulation from the ceiling, burned furniture and burned carpeting, covered the floor of the apartment. Trial Testimony, Robert Cryer, Petitioner's Checklist, Tab 3, at 791; Exhibit 12, Hef ner Deposition, at 16. During this inspection, Mr. Cryer also made an observation that would later come to have critical importance. Mr. Cryer noted that the smoke detector in the hallway of the Collins apartment was hanging from the ceiling by its wires. Trial Testimony, Robert Cryer, Petitioner's Checklist, Tab 3, at 753, 783. Though proper procedure requires photographing evidence in place before removal, *see* Exhibit 11, Stechschulte Deposition, at 13-14, no photograph was ever taken of the smoke detector. Although Mr. Cryer testified at trial that, by the end of the first day of his investigation he had reason to believe the fire had been started by arson, he took no physical samples on that day. Trial Testimony, Robert Cryer, Petitioner's Checklist, Tab 3, at 783, 789-94. Moreover, Mr. Cryer apparently released the fire scene for cleaning by the owners of the apartment building. Exhibit 11, Stechschulte Deposition, at 97-102; Exhibit 14, Sargent Deposition, at 150-54.

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[8] Tom Miller was the Chief of the Columbus Grove police department in June and July of 1986. His involvement in the investigation was minimal. He has since died. *See* Exhibit 14, Sargent Deposition, at 171-72.

Sometime during the afternoon of June 30, 1986, the apartment of Hope Collins was completely cleaned and gutted. Exhibit 11, Stechshulte Deposition, at 59, 97-102; Exhibit 14, Sargent Deposition, at 150-54; Trial Testimony, Robert Cryer, Petitioner's Checklist, Tab 3, at 791. At that time, Mr. Cryer had taken no samples from the apartment for testing by the OACL. Trial Testimony, Robert Cryer, Petitioner's Checklist, Tab 3, at 789-94; *see* Exhibit 14, Sargent Deposition, at 151. Although all law enforcement officials questioned in connection with this case acknowledge that proper procedure requires collection of samples prior to release of the scene, and the maintaining of a proper chain of custody of evidence, Exhibit 11, Stechshulte Deposition, at 13-14, 105; Exhibit 14, Sargent Deposition, at 37-38, neither took place in this case. Instead, Mr. Cryer allowed the apartment to be cleaned on the day of the fire and any evidence to be removed. Exhibit 11, Stechshulte Deposition, at 97-99; Exhibit 12, Heffner Deposition, at 48. Deputy Stechschulte, although not questioned on this point at trial, recalls seeing a truck backed up to the apartment and workmen throwing debris from the balcony of the Collins' apartment, to be hauled to the county landfill. Exhibit 11, Stechshulte Deposition, at 97-99. He made no effort to prevent the removal of any materials from the apartment. Exhibit 11, Stechshulte Deposition, at 97-100. Stechschulte was, however, upset that the apartment had been cleaned prior to the taking of evidence. Exhibit 14, Sargent Deposition, at 151.

Mr. Cryer returned to Putnam County to continue his investigation on July 1, 1986. At, that time, he informed the county prosecutor's office, through Assistant Prosecutor Randall Basinger, that he believed the fire had been started by arson. Trial Testimony, Robert Cryer, Petitioner's Checklist, Tab 3, at 785. Mr. Cryer had still taken no physical samples and had no laboratory results concerning the identification of ignitable liquids in the fire debris, but instead based his

conclusions merely upon his belief that certain burn patterns visible in the Collins apartment were conclusive evidence of the presence of ignitable liquids. Trial Testimony, Robert Cryer, Petitioner's Checklist, Tab 3, at 760. Richey has now presented unrefuted scientific evidence to demonstrate that Cryer's conclusions were, and are today, based upon unsound scientific analysis.

B. Identification of Richey as the Prime Suspect

The investigation of who started the fire quickly centered on the Petitioner, Kenneth Richey. During the afternoon and evening of June 29, 1986, Richey, along with a large group of others, had passed the time drinking and partying on the steps outside the apartment of Hope Collins. Prior to that time, Richey and his girlfriend, Kandace Barchet, had ended their relationship so that Barchet could begin a new relationship with another man, Mike Nichols. Trial Testimony, Kandace Barchet, Petitioner's Checklist, Tab 3, at 289; Trial Testimony, Mike Nichols, Petitioner's Checklist, Tab 3, at 337-38. Although the prosecution maintained that Richey was in a jealous rage from this break-up, many witnesses testified that Richey was not bothered at all. Trial Testimony, Candy Barchet, Petitioner's Checklist, Tab 3, at 312; Trial Testimony, Hope Collins, Petitioner's Checklist, Tab 3, at 86. At that time, Richey's hand was broken and was therefore in a bandage. *See* Trial Testimony, Robert Dannenberger, Petitioner's Checklist, Tab 3, at 188-89.

The intensity of the focus on Richey was increased by two other "facts." First, some members of the group who had been drinking on June 29, including Peggy Price a.k.a. Peggy Villearreal, recalled Richey making a statement concerning the building burning that evening. Trial Testimony, Robert Dannenberger, Petitioner's Checklist, Tab 3, at 171-72; Trial Testimony, Peggy Price, Petitioner's Checklist, Tab 3, at 224-25; Trial Testimony, Shirley Baker, Petitioner's Checklist,

Tab 3, at 395-96. Ms. Price has since recanted this testimony. Affidavit of Peggy Villearreal, ¶¶ 19-20 (Exhibit 18 to the Petition). Second, upon his discovery of the fire, Richey attempted to enter the Collins apartment to save Cynthia. Although Richey unquestionably undertook such actions at grave risk to his own life, Trial Testimony, Assistant Fire Chief Don Hoyt, Petitioner's Checklist, Tab 3, at 878-81, his actions were interpreted as evidence of his guilt, Exhibit 11, Stechschulte Deposition, at 151-54.

The investigation also revealed the whereabouts of Hope Collins, Cynthia's mother, during the fire. A friend of Ms. Collins, Denny Smith, had arrived at the Old Farm Village Apartments at approximately 3:30 a.m. on June 30, 1986. Trial Testimony, Hope Collins, Petitioner's Checklist, Tab 3, at 95. Ms. Collins left with Mr. Smith. Trial Testimony, Hope Collins, Petitioner's Checklist, Tab 3, at 100. She testified at trial that she left Richey to babysit for Cynthia. Trial Testimony, Hope Collins, Petitioner's Checklist, Tab 3, at 96-98. However, despite this testimony, Ms. Collins pleaded guilty to involuntary manslaughter, a third degree felony, arising from the fire and death of her daughter. Exhibit 15, *State of Ohio v. Hope Collins*, Transcript, August 15, 1986, at 2-3. Such a charge is inconsistent with the conclusion that she obtained a babysitter before leaving. *See* Exhibit 11, Stechschulte Deposition, at 155-56. Richey denies that he was asked to babysit or that he would agree to babysit, considering his state of intoxication at the time. Exhibit 16, Taped Interview of Kenneth Richey, dated July 1, 1986, at 30-31.

During the fire, Richey had to be physically restrained to stop him from entering the burning apartment of Hope Collins in an attempt to save Cynthia. Trial Testimony, Don Hoyt, Petitioner's Checklist, Tab 3, at 879. After he was restrained, the Columbus Grove Police Chief, Tom Miller, took Richey to the police station and questioned him merely

as a witness. Trial Testimony, Tom Miller, Petitioner's Checklist, Tab 3, at 656. Later in the afternoon on June 30, 1986, Deputy Stechschulte questioned Richey concerning his whereabouts during the fire. Trial Testimony, Steve Stechschulte, Petitioner's Checklist, Tab 3, at 940-41. Although Deputy Stechschulte reported to the Ohio Department of Youth Services that Richey appeared intoxicated upon his arrival at the Richey apartment, Stechschulte still questioned Richey. Exhibit 11, Stechshulte Deposition, at 143-45. Richey denied any involvement in the fire and explained that he had returned to his father's apartment to go to sleep following the party. *See* Trial Testimony, Steve Stechschulte, Petitioner's Checklist, Tab 3, at 940, 954. The next afternoon, Assistant Prosecutor Basinger ordered Richey arrested for starting the fire at the Collins apartment. Exhibit 14, Sargent Deposition, at 145, 219. Deputy Stechschulte, accompanied by Deputy Roy Sargent, returned to the Richey apartment in Columbus Grove, Ohio, arrested Richey and took him to the Sheriff's Department in Ottawa, Ohio. Trial Testimony, Roy Sargent, Petitioner's Checklist, Tab 3, at 673-74. At the Sheriff's Department, Richey was questioned by Deputy Sargent, Assistant Fire Marshall Cryer and Assistant Prosecutor Basinger. Trial Testimony, Roy Sargent, Petitioner's Checklist, Tab 3, at 676-77. Throughout the interrogation, Richey maintained his innocence. Trial Testimony, Roy Sargent, Petitioner's Checklist, Tab 3, at 716.

C. The Evidence Concerning Arson

On July 1, 1986, the state acquired its first physical evidence in the case against Richey. First, the state took Richey's clothing and boots that he had been wearing on the night of June 29 and early morning of June 30 for physical testing to detect the presence of ignitable liquids. Later testing by the OACL revealed no traces of ignitable liquids on any of

these objects, including the soles of Richey's shoes and the bandage that was wrapped around his broken hand. Exhibit 17, Arson Crime Laboratory Report, dated July 10, 1986. The state also acquired its first physical evidence from the fire on July 1, 1986. Sometime during that day, investigators claim to have "discovered" that the apartment had been cleaned out by the owners of the Old Farm Village Apartments. Trial Testimony, Robert Cryer, Petitioner's Checklist, Tab 3, at 791. Deputy Harry Berger, along with Deputy Dennis Cupp of the Putnam County Sheriff's Department, was sent to the county landfill to attempt to recover physical evidence from the apartment of Hope Collins, including the carpet from the living room of the apartment. Trial Testimony, Harry D. Berger, Petitioner's Checklist, Tab 3, at 641-47. Deputy Berger recovered a piece of carpeting, identified as that from Hope Collins apartment.[9] Exhibit 18, Supplementary Investigation Report Prepared by Harry D. Berger, dated July 2, 1986.

Given Mr. Cryer's conclusion that ignitable liquids had been used, another avenue pursued by the Sheriff's Department was to attempt to identify the source of those liquids. No empty containers from the alleged ignitable liquids were ever located. Exhibit 11, Stechschulte Deposition, at 146-47. The search later focused on a greenhouse across the street from the Old Farm Village Apartments, the K & J Greenhouse. The door to this greenhouse was unlocked and a storeroom contained gasoline and paint thinner. Trial Testimony, Kenneth Wright,

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[9] At trial, Richey's defense counsel, William Kluge, asked only limited questions concerning the recovery effort, Berger's instructions and the other debris from the apartment. *See* Trial Testimony, Harry D. Berger, Petitioner's Checklist, Tab 3, at 645-49. Furthermore, Kluge asked no questions about the handling of the carpet following its retrieval.

Petitioner's Checklist, Tab 3, at 620. Richey had taken some plants from the greenhouse earlier in the evening. *See* Trial Testimony, Kenneth Wright, Petitioner's Checklist, Tab 3, at 617-19. Although during trial the prosecution focused on this greenhouse as the source of the ignitable liquids used to start the fire, the owner of the greenhouse, Kenneth Wright, could not determine whether any gasoline or paint thinner was missing. Trial Testimony, Kenneth Wright, Petitioner's Checklist, Tab 3, at 620-21; Exhibit 11, Stechschulte Deposition, at 133. Moreover, Deputy Stechschulte testified in his deposition that his investigation did not reveal the source of the ignitable liquids. Exhibit 11, Stechshulte Deposition, at 146-47. Finally, no sample was ever taken from the greenhouse for testing and comparison by the Ohio Arson Crime Laboratory, as recommended by the Fire Marshal's manual when a source of ignitable liquids is potentially identified. Exhibit 19, Ohio Arson Crime Laboratory, "Collection, Preservation, and Submission of Physical Evidence of a Suspected Arson or Bombing," at 8, December 1983 ("OACL 1983 Manual").

The investigation by the Putnam County Sheriff's Department also revealed two other important facts. The first concerned the penchant of Cynthia Collins for playing with fire. Peggy Villearreal, a neighbor of Hope Collins, told the investigators and defense counsel of Cynthia's history of playing with matches and the fact that Cynthia had started at least one fire. Affidavit of Peggy Villearreal, ¶¶ 9-13 (Exhibit 18 to the Petition). Discovery during this federal action has confirmed these underlying facts. *See, e.g.*, Exhibit 1, Collins Deposition, at 78-80.

The investigation also revealed two pieces of information about the smoke detectors in Hope Collins' apartment and the apartment complex. First, Peggy Villearreal told the investigators that Hope Collins had disconnected her smoke

detector on the night of the fire.[10] Exhibit 14, Sargent Deposition, at 194-95, 207-08. The smoke detectors in the Old Farm Village Apartments were sensitive and would often be set off by cooking. Exhibit 1, Collins Deposition, at 39-41. Hope would therefore disconnect the smoke detector when she cooked, as she did with Peggy Villearreal during the evening of June 29, 1986. Exhibit 1, Collins Deposition, at 39-42, 44-45, 57-58. The investigation further revealed that residents of the Old Farm Village Apartments generally disconnected their smoke detectors because of their sensitivity. Exhibit 11, Stechschulte Deposition, at 138-39; Exhibit 20, Steven Stechschulte's Handwritten Notes. None of these facts, although exculpatory and material, were revealed by prosecutors to the defense. Exhibit 21, Affidavit of William F. Kluge, Esq. ("Kluge Affidavit"), ¶¶ 4-7; Exhibit 22, Affidavit of Gregory W. Donohue, Esq. ("Donohue Affidavit"), ¶¶ 4-6.

The investigation continued. On July 10, 1986, despite acquiring no further evidence concerning Richey, a Putnam County Grand Jury indicted Richey for aggravated murder, aggravated arson, breaking and entering, involuntary manslaughter, and child endangerment. Indictment, Petitioner's Checklist, Tab 18. Although Richey has repeatedly sought discovery of the testimony of witnesses at

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[10] In her affidavit filed with Richey's Habeas Petition, Ms. Villearreal relates her belief that she also informed defense counsel of this point. *See* Affidavit of Peggy Villearreal, ¶¶ 14-18 (Exhibit 18 to the Petition). The State now appears to concede this point, *see* Exhibit 23, Respondent's Motion for Ruling Under R.C. §2953.23(A) or for Ruling Under R.C. §2953.21(C) and/or for Summary Judgment Under R.C. §2953.21(D), at 9-10, although they questioned defense counsel extensively on this issue during depositions. Exhibit 21, Kluge Deposition, at 25-26; Exhibit 24, Donohue Deposition, at 13-16.

the grand jury, it has been revealed that, despite the requirements of Ohio law, no transcript was taken of the grand jury testimony. At Richey's arraignment, Gregory Donohue was appointed as Richey's counsel. Exhibit 24, Gregory W. Donohue Deposition, June 4, 1999 ("Donohue Deposition"), at 6-7. Given the magnitude of the charges, Donohue requested that William Kluge be appointed as co-counsel. This was later accomplished, and Mr. Kluge took over the role as lead counsel. Exhibit 24, Donohue Deposition, at 6-7.

Following Richey's indictment, the Assistant Fire Marshall Cryer acquired other physical samples for testing by the OACL. These samples included (1) carpeting; (2) wood from the deck of the Collins apartment; and (3) concrete from the living room floor of the Collins apartment. *See* Exhibit 25, Arson Crime Laboratory Report, dated July 28, 1986. At trial, defense counsel asked only limited questions concerning the acquisition of these samples. Discovery in this action, however, has revealed the following facts about the sampling accomplished by Mr. Cryer. The samples from the carpet were not taken until after recovery of the carpet from the county landfill. Exhibit 14, Sargent Deposition, at 173-76,178-80; Trial Testimony, Robert Cryer, Petitioner's Checklist, Tab 3, at 765. Moreover, sometime after recovery of the carpet, and before the sampling, the carpet was laid out in the parking lot behind the Sheriff's Department in Ottawa. Exhibit 14, Sargent Deposition, at 178-80. As can be seen in photographs and a diagram drawn by the members of the Sheriff's Department, the carpet was laid out near the gasoline pumping station used by the Sheriff's Department to refuel their cruisers. Exhibit 26, Photograph of Carpet in the Parking Lot of the Sheriff's Department; Exhibit 27, Diagram of Parking Lot of Sheriff's Department Prepared By Roy Sargent. During trial, Richey's counsel did not question the state's witnesses about the sampling of the carpet. During discovery in this action, Richey's counsel pursued this area. It

appears that the samples were taken from the carpet by Mr. Cryer while it was laid out in the Sheriff's Department parking lot a significant period of time (two to three weeks) following the fire. *See* Trial Testimony, Robert Cryer, Petitioner's Checklist, Tab 3, at 765-66, 790. Three samples were taken from the carpet. *See* Exhibit 25, Arson Crime Laboratory Report, dated July 28, 1986. During his deposition, Mr. Gelfius testified that the OACL was not told of the history of the carpet prior to testing. Exhibit 28, Gelfius Deposition, vol. I, June 8, 1999, at 74-75. Even if the OACL been so informed, it is unlikely that the OACL would have conducted any testing based upon concerns about the reliability of the evidence. Exhibit 28, Gelfius Deposition, vol. I, June 8, 1999, at 75-78.

The other samples, from the wood deck outside the Collins apartment and from the living room floor, were apparently taken some two and a half weeks after the fire. Although Mr. Cryer has testified that he reached an initial conclusion concerning the cause of the fire on June 30, 1986 and a more definite conclusion on July 1, 1986, sufficient to allow for the arrest of Richey on charges of arson, Mr. Cryer took no physical samples from the apartment for another two and a half weeks. Trial Testimony, Robert Cryer, Petitioner's Checklist, Tab 3, at 793-94. At that time, he took two samples from the deck and one from the concrete of the living room floor. Between the time of the fire and the time of this sampling, the Collins apartment was not secured. Exhibit 14, Sargent Deposition, at 150-54; Exhibit 11, Stechschulte Deposition, at 59, 97-101. Richey's current investigation has revealed that some work had been done on the deck prior to the sampling, including, at least, the removal of the railing. Exhibit 29, Photograph of deck with railing removed; Exhibit 14, Sargent Deposition, at 189-90 (noting that the Sheriff's Department did not remove the railings). This work was not done by members of law enforcement. Exhibit 14, Sargent

Deposition, at 189-90. Mr. Cryer, in violation of the policy manual issued by the State Fire Marshal's Office, did not take control samples of the deck or concrete floor. Exhibit 19, OACL 1983 Manual, at 11; Exhibit 25, Arson Crime Laboratory Report, dated July 28, 1986.

Mr. Cryer delivered these six samples (three pieces of carpet, two wood chips and one concrete chip) to the OACL for testing. The OACL declared that three of the samples were positive for ignitable liquids. Exhibit 25, Arson Crime Laboratory Report, dated July 28, 1986. According to Dan Gelfius, an OACL technician, one carpet sample contained gasoline; another carpet sample contained paint thinner, and one sample of wood from the deck contained paint thinner. *Id.* Mohamed Gohar, the Chief of the OACL, concurred in these conclusions. *Id.* The three other samples, a piece of wood from the deck, the concrete floor chip and a piece of carpet were identified as negative for ignitable liquids. *Id.* The negative carpet sample was identified as a "control sample" and further testing revealed that the carpet was not flame resistant. *Id.* In fact, after ignition and removal of the ignition source, the carpet continued to burn. *Id.*

The state also had the electrical evidence from Hope Collins' apartment investigated by System Engineering Associates of Columbus, Ohio. Randall Bills, an engineer from SEA, did not personally visit the apartment, but he did inspect both the electric fan, initially identified by Fire Chief Heffner as the cause of the fire, and the smoke detector after their removal from the apartment. Trial Testimony, Randall Bills, Petitioner's Checklist, Tab 3, at 859. He concluded that neither were the cause of the fire. Trial Testimony, Randall Bills, Petitioner's Checklist, Tab 3, at 864, 868. He also concluded that, due to the extreme damage to and melting of the smoke detector, he could not determine whether the smoke detector had operated during the fire. Trial Testimony,

Randall Bills, Petitioner's Checklist, Tab 3, at 864. Photographs of the smoke detector reveal the extreme damage it sustained from the fire. Exhibit 30, Photographs of the melted smoke detector.

Thus, by the end of July, the state had acquired the following evidence that the fire in Hope Collins' apartment had been caused by arson: first, Assistant State Fire Marshal Cryer identified certain characteristics of accelerated fires from his inspection of the apartment; second, the OACL identified ignitable liquids in three samples recovered during the investigation of the fire; and third, SEA eliminated the fan as a cause of the fire.

The prosecution had also acquired the following evidence concerning Richey as the possible arsonist. Richey, according to some witnesses, had threatened to burn the building containing the Collins apartment. Further, Richey, according to Hope Collins, had been babysitting for Cynthia at the time of the fire. Richey, along with everyone else, had access to the unlocked Collins apartment. Finally, and the coup de grace for the prosecution, Richey's former girlfriend, Ms. Barchet, was in the apartment below the Collins' apartment with her new boyfriend, Mike Nichols. Throughout this case it has been the prosecution's contention that this fact supplied the critical motive for the crime — Richey passed by the open window to Ms. Barchet's bedroom and then set the fire in the upstairs apartment in an attempt to kill his ex-girlfriend in the apartment below. *See* Closing Argument of the Prosecution, Petitioner's Checklist, Tab 5, at 1006.[11]

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[11] The prosecution has never maintained that Richey intended to kill Cynthia, but rather that his intent to kill Ms. Barchet and Nichols was transferred to Cynthia. *See* Bill of Particulars (Exhibit 9 to the Petition); *see also* Transcript of Argument Before Ohio Supreme Court (Exhibit 3 to the Petition, at 16); Closing Argument of the Prosecution, Petitioner's Checklist, Tab 5, at 1025-26.

D. Actions of Defense Counsel

It was this evidence that Kluge and Donohue, Richey's trial counsel, were charged with rebutting. In an attempt to respond to the state's evidence concerning the cause of the fire and the identification of ignitable liquids in the fire debris, Kluge retained L. Gregory DuBois of CTL Engineering in Columbus, Ohio. For Richey, this was perhaps a fatal mistake. DuBois, according to the resume he provided to Kluge, had very limited training in fire investigation. Exhibit 31, Letter from L. Gregory DuBois to William Kluge, dated September 11, 1986, attaching the Resume of L. Gregory DuBois and a Fee Schedule ("DuBois Resume").[12] DuBois had taken two courses in fire investigation, one in 1983 and the other in 1984. Exhibit 10, DuBois Deposition, at 21-33; 41. Each course had been only two days. Exhibit 10, DuBois Deposition, at 23-24, 32-33. DuBois's formal training is in Metallurgical Engineering. Exhibit 10, DuBois Deposition, at 7-8. Even worse from the point of view of a reasonable defense attorney, the two formal training courses DuBois had taken were taught by members of the State Fire Marshal's Office. Exhibit 31, DuBois Resume; Exhibit 10, DuBois Deposition, at 23, 32-33. The first course, which included DuBois's only formal training in the analysis of gas chromatograph data, was taught by Mohamed Gohar, the head of the OACL. Exhibit 10, DuBois Deposition, at 23. Thus,

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[12] During his deposition in this federal action taken by counsel for the Respondent, Kluge indicated that he located DuBois from a flyer he received in the mail. Exhibit 32 , Kluge Deposition, at 11-12. DuBois, on the other hand, believes Kluge told him that he had been recommended by someone in the law enforcement community. Exhibit 10, DuBois Deposition, at 64. DuBois's file contains a letter to Mr. Ron Straker of the Lima Fire Department, thanking him for the recommendation. Exhibit 33, Letter from L. Gregory DuBois to Ron Straker, dated September 16, 1986.

although Kluge hired DuBois to critique and question the methodologies of the OACL and the State Fire Marshal's Office, DuBois had no basis for doing so because he had learned all he knew about fire investigation from the OACL itself! Despite the limited training, and the source of that training, as listed on DuBois's resume, Kluge never questioned DuBois concerning these issues. See Exhibit 31, DuBois Resume; Exhibit 32, Kluge Deposition, at 13-14.

Furthermore, Kluge failed to provide DuBois with all of the relevant information necessary for DuBois to reach a conclusion. Kluge told DuBois, despite no indication from the court, that the budget in the case was very limited and that DuBois could only spend ten hours on the case.[13] Exhibit 10, DuBois Deposition, at 59-64, 67. DuBois, therefore, did not conduct as extensive an investigation as he otherwise might have. Exhibit 10, DuBois Deposition, at 12627, 180-81. Although both Kluge and DuBois, as well as Richey's current experts Dr. Andrew Armstrong and Harry Reinhardt, acknowledge that the general and proper procedure in a case such as this would be for the defense expert to retest any physical samples to confirm the OACL's conclusions, no such testing was conducted. Exhibit 10, DuBois Deposition, at 54-56; Exhibit 32, Kluge Deposition, at 23; Armstrong Affidavit, ¶21(b) (Exhibit 2 to the Petition); Supplemental Affidavit of Harry Reinhardt, ¶ 4 (Exhibit 7 to the Petition). Instead, DuBois merely traveled to the OACL in Reynoldsburg, Ohio to review their conclusions. Exhibit 10, DuBois Deposition, at 101-102. At that meeting, the head of the OACL, Mr. Gohar, as well as the technician who performed the testing of the Richey samples, Dan Gelfius, reviewed the OACL's

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[13] Richey was indigent and therefore required appointment by the court of any experts. Kluge moved for the appointment of DuBois specifically, which the court approved. *See* Exhibit 11 to Respondent's Return of Writ.

conclusions with DuBois. Exhibit 10, DuBois Deposition, at 101-102. In particular, they reviewed the gas chromatographs produced from the analysis of the samples the OACL had identified as positive for ignitable liquids. By the end of the meeting, DuBois had been convinced that the OACL was correct. Exhibit 10, DuBois Deposition, at 109-10. Moreover, Mr. Gohar, whom DuBois greatly respected, Exhibit 10, DuBois Deposition, at 31-32, 37, chided DuBois for working for the defense, Exhibit 10, DuBois Deposition, at 116-17. In fact, despite being retained by the defense, DuBois so respected the OACL that he deferred to their judgment. Exhibit 10, DuBois Deposition, at 118-19, 124-25. In his deposition as part of Richey's federal habeas action, DuBois admitted that he did not believe he was qualified to question the OACL. Exhibit 10, DuBois Deposition, at 118-19, 124-25. Kluge, however, was aware of nothing but DuBois's ultimate conclusion, as his conversations with DuBois were extremely limited.

Kluge also failed to inform DuBois of all relevant facts concerning the history of the physical samples in the case. Although Kluge told DuBois of some concerns with the control of the carpet, DuBois testified at his deposition that he was not informed of the complete factual history of the carpet, including the placement of the carpet in the parking lot of the Sheriff's Department. Exhibit 10, DuBois Deposition, at 98-100. When given this information, DuBois could not determine whether it would have changed his conclusions in the case. Exhibit 10, DuBois Deposition, at 173-74.

This is especially important in light of DuBois's scientific conclusions. Although he testified at trial that he agreed with all of the prosecution's conclusions, his deposition casts some doubt on this conclusion. Although DuBois testified that he did agree with the conclusion concerning the identification of gasoline, he was less sure concerning the two samples identified as positive for paint

thinner. Exhibit 10, DuBois Deposition, at 119. If he had been given the history of the carpet, which effectively explained the presence of gasoline in the sample, DuBois might have focused more carefully on the other conclusions reached by the OACL. Instead, after his meeting with the OACL, DuBois told Kluge that his conclusions would not help Richey and thus he did not feel he should testify. Exhibit 10, DuBois Deposition, at 125-27. Kluge simply acquiesced without pushing DuBois for details concerning his investigation. Exhibit 10, DuBois Deposition, at 125-26. In fact, Kluge met only briefly with DuBois and never received a written report. See Kluge Deposition at 17-18.[14]

The involvement of DuBois in the Richey case did not end there, however. On December 12, 1986, prior to receiving any report or conclusions from DuBois, Kluge listed DuBois as a witness he intended to call at trial. Exhibit 32, Kluge Deposition, at 16-17; Exhibit 31 to Respondent's Return of Writ. After receiving the oral report from DuBois, however, Kluge determined he would not call DuBois. Exhibit 32, Kluge Deposition, at 20-21. He then notified the prosecution of this decision. Exhibit 10, DuBois Deposition, at 135. The prosecution, clearly able to read the handwriting on the wall concerning DuBois, subpoenaed him to testify at trial. Exhibit 10, DuBois Deposition, at 134-35. Although DuBois contacted Kluge and requested his assistance in resisting the subpoena, Kluge took no action. Exhibit 10, DuBois Deposition, at 134-36. Thus, DuBois, the expert initially retained by Richey, was forced to testify at trial in favor of the prosecution. Kluge did not cross-examine DuBois, but rather,

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[14] At his deposition, Kluge testified that he believed DuBois had run independent tests to confirm the OACL's conclusion. Exhibit 32, Kluge Deposition, at 23. Thus, it is clear that Kluge had extremely limited contact with his expert.

despite believing DuBois had nothing helpful to say for the defense, reserved the right to call DuBois as a defense witness. Trial Transcript, Petitioner's Checklist, Tab 3, at 822.

Upon receipt of the oral report by DuBois, Kluge conducted no further investigation into the scientific evidence in the case. Kluge did not meet with DuBois to identify any mistakes in the procedures utilized by the state. Moreover, he did not meet with DuBois to learn sufficient facts concerning the investigation of the cause of fires and the identification of ignitable liquids in fire debris to allow for competent cross-examination of the state's witnesses on these points. Kluge did not press DuBois for the basis of his conclusions or whether he questioned any conclusions of the state. Exhibit 10, DuBois Deposition, at 136-37. Rather, from that point on, Kluge assumed, despite his wholly inadequate investigation, that he could not rebut the state's evidence of arson. Exhibit 32, Kluge Deposition, at 20-21. His focus turned, instead, to putting the State to its proof about the identification of Richey as the arsonist.[15] Exhibit 32, Kluge Deposition, at 20-21.

E. The Trial

At trial Kluge failed to present any scientific evidence concerning the cause of the fire. Further, Kluge failed to effectively cross-examine the state's witnesses on this point. Despite convincing Richey to waive a jury trial given the emotional nature of the case, Kluge failed to present evidence of Cynthia Collins' history of playing with fire. Finally, Kluge

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[15] That Kluge's "strategy" was merely to put the State to its proof is demonstrated by the extremely limited defense Kluge presented at the guilt phase of the trial. Kluge called only two witnesses, the manager of the Old Farm Village Apartments and Tom Miller, the Chief of Police of Columbus Grove, who had already testified for the State. *See* Trial Transcript, Petitioner's Checklist, Tab 4, at 975-1002 (entire defense case, including cross-examination by the state).

failed to focus upon and question any evidence concerning the smoke detector at Hope Collins' apartment. Even if such a failure were arguably "strategic" during the guilt phase of the trial, there is simply no justification for failing to raise this question at the penalty phase, after Richey stood convicted.

On January 8, 1987, Richey was convicted of aggravated murder, aggravated arson, breaking and entering, and child endangerment by a three-judge panel in the Putnam County Court of Common Pleas in Ottawa, Ohio. After a sentencing hearing, that panel sentenced Richey to death on January 26, 1987. The three judge panel explicitly relied upon their belief that Richey had disconnected the smoke detector to determine that the aggravating circumstances outweighed any mitigating circumstances. Opinion of the Trial Judge in a Capital Case, February 9, 1987 (Exhibit 15 to the Petition); *id.*, Petitioner's Checklist, Tab 17, at 2.

F. The Direct Appeal

Kluge and Donohue did not handle the direct appeal. Instead, they handed the case off to the Capital Crimes section of the Ohio Public Defenders Office. In 1987, that office was headed by David Stebbins. Exhibit 34, Murray Deposition, at 10. Mr. Stebbins assigned Ken Murray, with the assistance of Jane Perry, to the Richey case. Exhibit 34, Murray Deposition, at 11, 13-14. Mr. Murray and Ms. Perry both acknowledge that they failed to provide effective assistance to Richey in his direct appeal. Affidavit of Ken Murray ("Murray Affidavit"), ¶¶ 11 -15 (Exhibit 19 to the Petition); Affidavit of Jane Perry ("Perry Affidavit"), ¶¶ 5-9, Petitioner's Checklist, Tab 33, Attachment D. They acknowledge that they simply failed to address important legal issues and that the failure was not based upon a strategic decision. Murray Affidavit, ¶¶ 11-15 (Exhibit 19 to the Petition); Perry Affidavit, ¶¶ 5-9, Petitioner's Checklist, Tab 33, Attachment D.

Mr. Stebbins also instructed Mr. Murray not to raise ineffective assistance of counsel arguments on direct appeal due to his friendship with Mr. Kluge, Exhibit 34, Murray Deposition, at 50-51; Murray Affidavit ¶¶ 5-8 (Exhibit 19 to the Petition); *see also* Exhibit 35, Stebbins Deposition, at 64-65. Stebbins and Kluge had become friendly as members of the criminal defense bar in Ohio. Exhibit 32, Kluge Deposition, at 26; Exhibit 35, Stebbins Deposition, at 37-39. At least partially on this basis, Stebbins held a closed door meeting with Murray and instructed him not to raise ineffective assistance of counsel arguments on direct appeal. Exhibit 34, Murray Deposition, at 17-23, 26-27, 50-51; *see* Exhibit 35, Stebbins Deposition, at 64-65. Although Murray testified that he snuck back into the office late one night to add an ineffective assistance of counsel claim to the direct appeal brief, the argument left out important aspects of Kluge's ineffective assistance and presented the claims in a generally weak fashion. Murray Affidavit, ¶ 8 (Exhibit 19 to the Petition); Exhibit 34, Murray Deposition, at 17, 34-35, 41-42.

The Ohio Court of Appeals affirmed the conviction and death sentence of Richey. The Ohio Supreme Court similarly affirmed, in a four to three decision. The United States Supreme Court denied certiorari on March 22, 1993.

III. At Least, the Court Should Exercise its Discretion and Hold an Evidentiary Hearing

This Court should exercise its discretion to hold an evidentiary hearing if it determines that such a hearing is not mandatory. As the Supreme Court has noted, even if an evidentiary hearing is not mandatory, the District Court maintains the discretion to hold such a hearing.

> The purpose of the test is to indicate situations in which the holding of an evidentiary hearing is mandatory. In all other cases where the material

> facts are in dispute, the holding of such a hearing is in the discretion of the district judge.

Townsend, 372 U.S. at 318. An evidentiary hearing is especially appropriate when a habeas petition presents the claims of an individual subject to execution. "In a capital case, a habeas petitioner who asserts a colorable claim to relief, and who has never been given the opportunity to develop a factual record on that claim, is entitled to an evidentiary hearing in federal court." *Siripongs v. Calderon*, 35 F.3d 1308, 1310 (9th Cir. 1994), *cert. denied*, 513 U.S. 1183 (1995). Given the factual record in this case, as described above, this court should exercise its discretion and allow Petitioner to present testimonial evidence during an evidentiary hearing.

IV. Although the Respondent May Argue to the Contrary, 28 U.S.C. § 2254(e)(2) Does Not Prohibit an Evidentiary Hearing in this Case.

The Amended Effective Death Penalty Act ("AEDPA") does not prohibit an evidentiary hearing in this case. Richey filed the instant Petition after the adoption of the AEDPA on April 24, 1996. Respondent may argue that, under the terms of that statute, Richey is not entitled to an evidentiary hearing in this case. Following the adoption of the AEDPA, federal law now provides:

> If the applicant has *failed to develop the factual basis of a claim in State court proceedings*, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that —
>
> (A) the claim relies on —
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2) (emphasis added). Because Richey sought to develop and present his evidence in an evidentiary hearing before the state courts, 28 U.S.C. § 2254(e)(2) does not apply to this case.

A. 28 U.S.C. § 2254(e)(2) Does Not Bar Richey's Evidentiary Hearing Because Richey Sought to Develop and Present These Facts Before the State Courts.

Every Court of Appeals to address the scope of § 2254(e)(2) has concluded that it does not prohibit an evidentiary hearing if the Petitioner sought an evidentiary hearing in state court but was denied. As Richey unquestionably sought such a hearing, § 2254(e)(2) does not prohibit this Court from granting the instant motion.

Richey sought to develop the factual basis for his claims in his state court post-conviction proceedings. In his Petition to Vacate or Set Aside Sentence: O.R.C. Section 2953.21, Richey explicitly sought discovery and an evidentiary hearing before the Ohio state courts. *See* Petitioner's Checklist, Tab 40, at 6 ("The risk of such a gross miscarriage of justice in violation of Richey's constitutional rights, particularly in a death penalty case, should compel this Court to grant Richey discovery, evidentiary hearing, and a new trial."); *see also id.* at 52 (requesting evidentiary hearing in demand for relief). In response to this petition in state court, the state filed a Motion for Ruling Under R.C. 2953.21(C) and/or Motion for Summary Judgment under R.C. 2953.21(D). Petitioner's

Checklist, Tab 41. In opposition, Richey continued to insist upon his right to an evidentiary hearing before the state court. *See* Kenneth T. Richey's Memorandum In Opposition to the State's Motion for Ruling Under R.C. 2953.21(C) and/or Motion for Summary Judgment Under R.C. 2953.21(D), Petitioner's Checklist, Tab 42, at 2 ("Because that evidence, if true, would establish both Richey's actual innocence, and, as will be seen, that he received ineffective assistance of counsel, there must be an evidentiary hearing to evaluate the substantive claims raised by the Petition."). The Court of Common Pleas, Putnam County, Ohio, denied Richey's Petition to Vacate without an evidentiary hearing. *See* Findings of Fact, Conclusions of Law, Entry Denying Petition to Vacate or Set Aside Sentence Without a Hearing, Petitioner's Checklist, Tab 43.

The Respondent may not rely upon § 2254(e)(2) because Richey's failure to develop any facts in state court was through no fault of his own. The Fourth Circuit's decision in *Cardwell v. Greene*, 152 F.3d 331 (4th Cir.), *cert. denied*, __U.S.__, 119 S. Ct. 587 (1998), is representative of decisions limiting the scope of § 2254(e)(2). *See also Miller v. Champion*, 161 F.3d 1249, 1253 (10th Cir. 1998); *McDonald v. Johnson*, 139 F.3d 1056, 1059 (5th Cir. 1998); *Burris v. Parke*, 116 F.3d 256, 258-59 (7th Cir. 1997); *Jones v. Wood*, 114 F.3d 1002, 1013 (9th Cir. 1997); *Love v. Morton*, 112 F.3d 131, 136 (3d Cir. 1997). *Cardwell* explains that, while *Townsend*, 372 U.S. 293, as modified by *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), still sets forth the operatives standard for determining whether a habeas petitioner is entitled to an evidentiary hearing, § 2254(e)(2) creates an "initial hurdle" that a petitioner must overcome.

> The petitioner who seeks an evidentiary hearing in federal court must now clear the "initial hurdle" of § 2254(e)(2), . . . before the court can proceed to

> determine whether an evidentiary hearing is otherwise proper or necessary. Thus, a federal court's first task in determining whether to grant an evidentiary hearing is to ascertain whether the petitioner has "failed to develop the factual basis of a claim in State court."

Cardwell, 152 F.3d at 336-37 (citation omitted). In *Cardwell*, certain facts in support of the petition had not been developed in state court. *Id.* at 337. The Fourth Circuit noted, however, that this was due not to Cardwell's failure to attempt to develop the facts, but rather to the denial of Cardwell's request for an evidentiary hearing in state court. *Id.* The Fourth Circuit therefore confronted the question of whether Cardwell "failed" to develop the facts in support of his petition under these circumstances. The court concluded:

> We join four of our sister circuits in holding that where an applicant has diligently sought to develop the factual basis of a claim for habeas relief, but has been denied the opportunity to do so by the state court, § 2254(e)(2) will not preclude an evidentiary hearing in federal court.

Id. (joining the Third, Fifth, Seventh, and Ninth Circuits). Thus, § 2254(e)(2) does not prevent this court from granting Richey's motion.

Section 2254(e)(2) was designed to prevent a petitioner from attempting to circumvent state court review of his claims by not fully presenting claims to the state courts. "In the interest of comity, § 2254(e)(2) forbids the federal court to grant an evidentiary hearing to a petitioner who has deprived the state courts of a meaningful opportunity to rule on a federal claim." *Id.* at 337-38. However, if the failure to develop facts is due to an action by the State or the courts, then § 2254(e)(2) does not prohibit a federal evidentiary hearing.

> We conclude that there is a material distinction... between a petitioner's failure to seek or to seize an opportunity to present evidence, and an inability to persuade a state court that an evidentiary hearing is required. The lack of factual development in the second instance results not from an omission by the petitioner, but from the state court's determination that an evidentiary hearing is unnecessary.

Id. at 338. As described above, Richey sought an evidentiary hearing before the Ohio courts to present and develop the facts at issue in his federal Petition for a Writ of Habeas Corpus. Any lack of factual development stems from the failure of the state court to grant such a hearing, and not from any failure on the part of Richey. Under these circumstances, § 2254(e)(2) does not prohibit a federal evidentiary hearing.

Conclusion

For the foregoing reasons, Petitioner's Motion for Evidentiary Hearing should be allowed.

Respectfully submitted,

KENNETH T. RICHEY

By his attorneys,

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

KENNETH T. RICHEY,	:	
Petitioner,	:	Case Number: 1:98 CV 1418
v.	:	Civil Action
BETTY MITCHELL, Warden,	:	JUDGE GAUGHAN
Respondent.	:	

Respondent's Memorandum in Response to Richey's Motion for an Evidentiary Hearing

Richey has filed a motion for an evidentiary hearing, but he has not demonstrated that he is entitled to one under the governing rules. A memorandum in response follows.

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF CONTENTS 11a

TABLE OF AUTHORITIES 14a

MEMORANDUM IN SUPPORT

I. INTRODUCTION.....16a

II. RICHEY FAILS TO DEMONSTRATE THAT HE IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS ACTUAL INNOCENCE CLAIMS 16a

A. Standards Governing Actual Innocence Claims.....16a

(1) *There is no such thing as a "free-standing" actual innocence claim, and even if there is, Richey fails even to allege the existence of evidence that unquestionably proves his innocence* 17a

(2) *Richey fails to prove that "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence"* 18a

(3) *The record is sufficient to evaluate the actual innocence claims without a hearing* 18a

B. The State produced compelling circumstantial and direct evidence of Richey's guilt, all of which are still entitled to a presumption of correctness 20a

C. Richey's allegations, even if true, fail to demonstrate actual innocence 26a

(1) *Dr. Armstrong cannot rule out the presence of accelerants in the samples from Hope*

Collins' carpet and the wood from her balcony 27a

(2) *Richard Custer cannot rule out arson as a possible cause of the fire* 30a

D. When the Court applies the law to the facts as developed, the Court will find that there is no evidence of actual innocence 33a

III. RICHEY IS NOT ENTITLED TO A HEARING ON HIS INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS 36a

A. Trial counsel's strategy for handling the State's evidence of arson was sound; counsel were not ineffective in relying on an independent, qualified expert and in not "shopping" for a more favorable opinion 36a

B. Trial counsel were not ineffective in their handling of the evidence concerning the smoke detector 44a

C. Richey fails to demonstrate that appellate counsel in his direct appeal to the court of appeals were ineffective, and because he fails to point to any prejudice, there is no need to hold a hearing 47a

D. Conclusion regarding ineffective assistance of counsel 48a

IV. RICHEY IS NOT ENTITLED TO AN EVIDENTIARY HEARING TO RETRY ALL OF THE FACTS IN THE CASE 48a

V. CONCLUSION 49a

CERTIFICATE OF SERVICE.....50a

APPENDIX (excerpts from depositions)

Deposition of Mary Margaret Villearreal .....A

Deposition of Andrew Armstrong .....B

Deposition of Steven Stechschulte.....C

Deposition of Richard Custer .....D

Deposition of L. Gregory DuBois .....E

Deposition of William Kluge .....F

Deposition of Gregory Donohue .....G

Deposition of Hope Sterling .....H

Deposition of Kenneth Murray.....I

TABLE OF AUTHORITIES

FEDERAL CASES

Blackledge v. Allison, 431 U.S. 63 (1977) 4

Burris v. Parke, 116 F.3d 256 (7th Cir. 1997).....27

Calderon v. Thompson, __U.S.__, 118 S. Ct. 1489 (1998) 3

Cardwell v. Greene, 152 F.3d 331 (4th Cir.), cert. denied, 525 U.S. 1037 (1998).....4

Carriger v. Stewart, 132 F.3d 463 (9th Cir. 1997).....2

Carter v. Johnson, 110 F.3d 1098 (5th Cir.), cert. granted, vacated and remanded on other grounds, __ U.S.__, 118 S. Ct. 409 (1997).....18

Cornell v. Nix, 119 F.3d 1329 (8th Cir. 1997) 2

Creel v. Johnson, 162 F.3d 385 (5th Cir. 1998) 2

Fairchild v. Norris, 51 F.3d 129 (8th Cir.), cert. denied, 515 U.S. 1182 (1995).....3

Groseclose v. Bell, 130 F.3d 1161 (6th Cir. 1997), cert. denied, 118 S.Ct. 1826 (1998) 5

Guinan v. United States, 6 F.3d 468 (7th Cir. 1993).....2

Hendricks v. Calderon, 70 F.3d 1032 (9th Cir. 1995), cert. denied, 517 U.S. 1111 (1996).....21

Herrera v. Collins, 506 U.S. 390 (1993) 2,5

Kavanaugh v. Beree, 73 F.3d 733 (7th Cir. 1996).....4

McDonald v. Johnson, 139 F.3d 1056 (5th Cir. 1998) 4

Meadows v. Delo, 99 F.3d 280 (8th Cir. 1996).....2

Milone v. Camp, 22 F.3d 693 (7th Cir. 1994).....19

Mitchell v. Rees, 114 F.3d 571 (6th Cir. 1997),
cert. denied, 522 U.S. 1120 (1998) 8,18,30

Nevers v. Killinger, 169 F.3d 352 (6th Cir.),
cert. denied, 119 S. Ct. 2340 (1999) 29

O'Dell v. Netherland, 95 F.3d 1214 (4th Cir. 1996) 2

Rodriguez v. Zavaras, 42 F. Supp. 2d 1052
(D.Colo. 1999) 28

Ruiz v. Norris, 71 F.3d 1404 (8th Cir. 1995),
cert. denied, 519 U.S. 963 (1996) 5

Satcher v. Pruett, 126 F.3d 561 (4th Cir.),
cert. denied, 522 U.S. 1010 (1997) 16,17

Schlup v. Delo, 513 U.S. 298 (1995) 3,15,17

Sellers v. Ward, 135 F.3d 1333 (10th Cir. 1998).....2

Sidebottom v. Delo, 46 F.3d 744 (8th Cir.),
cert. denied, 516 U.S. 849 (1995).....21

Sims v. Livesay, 970 F.2d 1575 (6th Cir. 1992) 30

Strickland v. Washington, 466 U.S. 668 (1984) 19,20,29

Wilson v. Greene, 155 F.3d 396 (4th Cir.),
cert. denied, 525 U.S. 1012 (1998).....20

STATE CASES

State v. Richey, 64 Ohio St. 3d 353 (1992) 5-8

State v. Richey, Putnam App. No. 12-97-7 18,20

FEDERAL STATUTES

28 U.S.C. §2254(e)(1) 5,30

28 U.S.C. §2254(e)(2) 27,30

MEMORANDUM IN SUPPORT

I. INTRODUCTION

As the State has maintained since Richey first presented his "newly-discovered" evidence, this case is about belated expert shopping, not actual innocence. Richey has located experts willing to contest the scientific proof of arson admitted at Richey's trial. And Richey faults his trial counsel for not "shopping around" for new experts after their own expert agreed with the State's experts.

To ensure that Richey had every opportunity to develop the facts in support of his claims, we did not oppose Richey's discovery requests concerning actual innocence and ineffective assistance of trial counsel. Indeed, we requested additional discovery (in the form of nonprivileged documents from Richey and his agents as well as depositions) to make sure that all facts concerning these claims would be unearthed. Having finished the discovery process, we find that there is no evidence of actual innocence or ineffective assistance of trial counsel even if Richey's proposed facts are true, as Richey leaves virtually untouched the State's circumstantial evidence as well as direct evidence of admissions that prove his guilt irrespective of the scientific evidence. Richey is therefore not entitled to an evidentiary hearing.

II. RICHEY FAILS TO DEMONSTRATE THAT HE IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS ACTUAL INNOCENCE CLAIMS.

A. Standards Governing Actual Innocence Claims

Richey has raised both a "free-standing" actual innocence claim as well as a "gateway" actual innocence claim. Both claims fail and a hearing is unnecessary even if Richey could prove everything he says he could prove.

(1) *There is no such thing as a "free-standing" actual innocence claim, and even if there is, Richey fails even to allege the existence of evidence that unquestionably proves his innocence.*

Richey first claims entitlement to a hearing on his "free-standing" claim of actual innocence. That is, Richey wants an opportunity to retry his case and demonstrate his actual innocence without concomitantly demonstrating an attendant constitutional violation. Richey relies upon Herrera v. Collins, 506 U.S. 390 (1993). But the circuit courts disagree whether Herrera established the propriety of such a claim. Several courts have read Herrera as disallowing such free-standing claims in habeas. Creel v. Johnson, 162 F.3d 385, 395 (5th Cir. 1998); Sellers v. Ward, 135 F.3d 1333, 1338-1339 (10th Cir. 1998); Guinan v. United States, 6 F.3d 468, 470 (7th Cir. 1993); Meadows v. Delo, 99 F.3d 280, 283 (8th Cir. 1996). Other courts have read Herrera in the opposite way or at least assumed for the sake of argument that habeas courts could consider free-standing claims of actual innocence. Carriger v. Stewart, 132 F.3d 463, 476 (9th Cir. 1997) (en banc) (holding that "free-standing" actual innocence is a proper claim but not finding sufficient evidence of it); Cornell v. Nix, 119 F.3d 1329 (8th Cir. 1997); O'Dell v. Netherland, 95 F.3d 1214, 1246 n.25 (4th Cir. 1996) (assuming for the sake of argument that "free-standing" actual innocence states a claim, but noting that the Herrera opinion at 506 U.S. at 416-17 seems to dictate otherwise).

For purposes of this memorandum, we will assume for the sake of argument that a petitioner may raise a "free-standing" claim of actual innocence. The Supreme Court's discussion of the issue indicates that a petitioner must convince the court "that those new facts unquestionably establish [the petitioner's] innocence." Schlup v. Delo, 513 U.S. 298, 316-317 (1995). Richey has not uncovered any such facts, and does not even suggest that he has done so.

(2) *Richey fails to prove that "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence."*

Unlike "free-standing" claims of innocence, "gateway" claims used to avoid procedural defaults involve a well-defined standard.[1] Schlup v. Delo, 513 U.S. 298 (1995). The Supreme Court requires the petitioner to demonstrate not merely a reasonable doubt in light of new evidence, but rather that "it is more likely than not that no reasonable juror would have convicted [the petitioner] in light of the new evidence." Id. at 327. It is not what this Court thinks, but the Court's "probabilistic determination" about what reasonable, properly instructed jurors would do. Id. at 329. The reviewing standard is an objective one. Calderon v. Thompson, __U.S.__, 118 S.Ct. 1489, 1502 (1998). Stated another way, the petitioner fails to meet his burden if "at least one juror, acting reasonably and properly instructed would have found" him guilty. Fairchild v. Norris, 51 F.3d 129, 130-131 (8th Cir.), cert. denied, 515 U.S. 1182 (1995); Schlup v. Delo, 513 U.S. at 329.

(3) *The record is sufficient to evaluate the actual innocence claims without a hearing.*

Richey cannot prove that he is unquestionably innocent, much less probably innocent. The Court has ample facts

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[1] We also note that Richey's claimed need to demonstrate "gateway" actual innocence is premature. The Court will need to reach this inquiry only if it finds that a ground for relief is procedurally defaulted and that Richey cannot demonstrate cause and prejudice for the default. Schlup v. Delo, 513 U.S. at 314-315. Respondent has not yet even asserted a procedural default defense. Moreover, it only makes sense to conduct this inquiry if the Court determines that an otherwise procedurally defaulted claim will result in relief.

before it that point to that conclusion, and thus a hearing is not required. McDonald v. Johnson, 139 F.3d 1056, 1060 (5th Cir. 1998); Cardwell v. Greene, 152 F.3d 331, 338-39 (4th Cir.) ("Cardwell has failed to forecast any evidence beyond that already contained in the record, or otherwise to explain how this claim would be advanced by an evidentiary hearing. The district court has already expanded the record to permit the inclusion of the reports.... We have long held that the need for an evidentiary hearing may be obviated by such expansion of the record; he has failed to demonstrate that any explication or clarification of the short and straightforward reports is required"), cert. denied, 525 U.S. 1037 (1998).

Indeed, the discovery process in this case represents an alternative to conducting an evidentiary hearing since that process led to full development of the facts concerning Richey's claims. The Supreme Court held that discovery and expansion of the record could be sufficient remedies to construct a record upon which the district court can decide a claim. Blackledge v. Allison, 431 U.S. 63, 81-82 (1977) (holding that a circuit court's remand for an evidentiary hearing was not necessary to decide a petitioner's claim that his plea was based on an unfulfilled promise from the prosecutor. The Court noted that Habeas Rules 6 and 7 could provide the necessary record for resolution of the claim).[2]

Since Richey cannot demonstrate his innocence even if his claims proved to be true, a hearing is not required. Kavanaugh v. Berge, 73 F.3d 733, 737 (7th Cir. 1996) (affirming denial of evidentiary hearing where petitioner was not allowed to call affiants at state court hearing, holding that

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[2] Respondent will be filing the original deposition transcripts in its possession pursuant to Habeas Rule 7.

"[t]he in-person testimony of the affiants was unnecessary; the affidavits represented the most favorable version of Kavanaugh's arguments. If he could not win based on the affidavits, live testimony would not have helped"); Ruiz v. Norris, 71 F.3d 1404, 1406 (8th Cir. 1995), cert. denied, 519 U.S. 963 (1996).

B. The State produced compelling circumstantial and direct evidence of Richey's guilt, all of which are still entitled to a presumption of correctness.

There is an important concept that is conspicuous by its absence from Richey's motion: presumption of correctness. 28 U.S.C. §2254(e)(1). Richey fails to discuss this concept because he views this case as a retrial in which the slate is wiped clean and this Court gets to decide the facts anew. Of course, federal habeas does not provide a forum for the retrial of a convicted felon. Herrera v. Collins, 506 U.S. at 401.

Federal courts must defer to state court factual findings, affording a presumption of correctness that a habeas petitioner may rebut only with clear and convincing evidence. Groseclose v. Bell, 130 F.3d 1161, 1163-64 (6th Cir. 1997), cert. denied, _U.S._, 118 S.Ct. 1826 (1998) (citing McQueen v. Scroggy, 99 F.3d 1302, 1310 (6th Cir. 1996), cert. denied, 520 U.S. 1257 (1997)); 28 U.S.C. §2254(e)(1).

The State presented substantial evidence that Richey had a motive for setting the fire; he had opportunity to obtain accelerants to start the fire; he had an opportunity to set the fire; and he made numerous statements implicating himself as the person who in fact set the fire that killed Cynthia Collins. Respondent will set forth the Ohio Supreme Court's findings, which are supported by the record and presumed correct:

> Around 4:15 a.m., on June 30, 1986, in Columbus Grove, Ohio, a raging fire broke out in Hope Collins's second-floor apartment, killing Cynthia

Collins, Hope's two-year-old daughter. Less than an hour before, Hope had left her apartment after Kenneth T. Richey, defendant-appellant, agreed to baby-sit Cynthia. Circumstantial evidence established that while in Hope's apartment, Richey had spread gasoline and paint thinner around the apartment and ignited it.

Richey, Hope, Peggy Price, Candy Barchet, Richey's ex-girlfriend, and a variety of other witnesses to these events lived at the Old Farm Village Apartments in Columbus Grove. Peggy and Hope lived in adjacent second-floor apartments, and Candy lived directly below Hope. All three apartments were in Building or Section "A" at Old Farm Village. Candy and her infant son moved into their apartment around June 15, and she met Richey. Within a few days, Candy and Richey formed a sexual relationship, and Richey frequently told Candy he loved her and "would kill any other guys" she was with.

On June 24, Richey learned that Candy had just been in bed with John Butler, and Richey pulled a knife on Butler. In response, Butler "bounced him around the room a little bit." Just after that fracas, Richey broke his hand by punching a door, requiring a splint.

On Sunday evening, June 29, Candy took her new boyfriend, Mike Nichols, to a party in Peggy's apartment; during the party, Candy kissed Nichols openly and told Richey that she wanted to date Nichols. Richey became upset at this news. When Candy went home, around 1:00 a.m., she asked Nichols to spend the night with her, which he did.

That night, Richey wore his Marine Corps camouflage fatigues and combat boots, and he still had his right hand bandaged in a splint. Some witnesses reported Richey was intoxicated. Jeffrey Kezar recalled Richey saying, "If I can't have her [Candy], nobody else can."

Richey told several persons that Building "A" would burn that night and he would use his Marine training to do that. Robert Dannenberger described Richey as "very upset" and said Richey threatened to blow the place up since he had "learned how to do explosives" in the Marines. Peggy Price became upset, and Richey told her, "Well, instead of blowing it up, I'll torch A Section." Price recalled that Richey said, "Before the night is over, part of A Building is going to burn down." Shirley Baker also recalls Richey saying, "A Building was going to burn * * *." Juanita Altimus, while just outside her own apartment, overheard Richey say on the landing, "Building A was going to burn tonight."

By 2:00 a.m., the party was breaking up, and Richey kept asking Hope if he could spend the night on her sofa. Hope refused. Around 2:20 a.m., June 30, Richey offered to steal some flowers for Peggy from a greenhouse across the street, but Peggy told Richey not to bring them to her.

Between 3:00 and 3:30 a.m., Dennis Smith drove up and asked Hope to go with him. Hope replied she did not have a baby-sitter, but Richey said, "Well, I'll keep an eye on her [Cynthia], if you'll let me sleep on your couch." A neighbor also overheard Hope say to Richey, "Go upstairs with Scootie [Cynthia's nickname] – she's asleep - but don't lock the door because I can't get back in because I don't have a key."

Around 4:15 a.m., neighbors reported bright orange flames and smoke coming out of the Collins apartment, and the fire department responded. Firemen saw several feet of flames from the apartment and deck curl up over the roof. A resident and a fireman both started into the apartment, but the heat and fire were too intense. A fireman then went back in, with oxygen, but he could not find Cynthia and soon ran out of oxygen.

Ultimately, several firemen, with fire hoses and oxygen masks, succeeded in removing Cynthia's body from her burning bedroom. Cynthia died from asphyxia related to smoke inhalation.

When the firemen arrived, Richey was either at the Collins apartment or he arrived shortly thereafter; he was screaming that a child was still inside. One fireman saw him coming out of the apartment, helped him up, and had to restrain him to keep him from going back in. Richey was combative, argumentative, and interfered with efforts to fight the fire and rescue Cynthia. Two deputy sheriffs overpowered Richey and turned him over to Police Chief Thomas Miller to keep him out of the way.

During the fire, Richey asked Nichols, "Why don't we finish it now, since you think you're so bad[?]" Richey also asked Candy if the fire had scared her. When she replied it had, Richey told her, "if he couldn't have me, that nobody would * * *." Altimus reported that Richey, as he looked over the fire damage, drank a beer, laughed, and said, "It looks like I did a helluva good job, don't it."

Richey admitted that he had earlier gotten two plants from the K & J Greenhouse for Candy, and police

found those plants outside Candy's apartment. The K & J owner identified them as having been stolen from his greenhouse. Richey had also offered to steal two plants for Peggy that evening. The K & J owner confirmed that paint thinner and gasoline were kept in two unlocked storage sheds. Gasoline and paint thinner could have been stolen from these sheds; the owner did not know if any was missing.

Assistant State Fire Marshal Robert Cryer concluded from the physical evidence and burn patterns that an accelerant had been used. An accelerant had been poured on the apartment's wooden deck, the fire's point of origin, as well as the living room rug. A smoke detector had been pulled from the ceiling before the fire. The fire was a very fast, hot, intense fire because of the accelerant.

Gregory DuBois, a consulting engineer, agreed that the fire had been caused by arson and that accelerants had been used. One rug sample from the Collins apartment contained gasoline, and another rug sample revealed paint thinner. Wood chips from that apartment's deck also contained paint thinner. However, laboratory tests failed to reveal any accelerants on Richey's fatigues or boots.

Chief Miller interviewed Richey as a witness on the morning of June 30 and also obtained his statement in the afternoon after advising him of his rights. By July 1, the investigation had focused on Richey, and police arrested Richey for arson and took further statements after advising him of his rights. Police tape-recorded an interview of Richey on July 1. Fire Marshal Cryer and Assistant Prosecuting Attorney Randy Bassinger participated in that interview

> In these statements, Richey maintained that he had been drunk on June 30 and did not remember much. However, he denied starting the fire or knowing how it started. He also denied that Hope had asked him to baby-sit Cynthia, and claimed that he had been at his father's apartment when the fire began. Richey did admit that he knew Cynthia was in Hope's apartment; he had stopped and looked in on her while she was sleeping during the party. Richey also claimed that he had secret ways with witnesses so they would not testify against him. In a later statement, he said he would cut the prosecutor's throat.

State v. Richey, 64 Ohio St.3d 353, 353-56 (1992).

The facts as found by the Ohio courts more than amply demonstrate Richey's guilt. Under these circumstances, this Court would err were it to dispense with the presumption of correctness and find that a hearing is mandatory. Mitchell v. Rees, 114 F.3d 571, 577 (6th Cir. 1997) (applying former version of 28 U.S.C. §2254), cert. denied, 522 U.S. 1120 (1998).

Richey has attacked some of the circumstantial evidence of his guilt, but even those attacks fell apart upon closer inspection. Richey continues to rely on the affidavit of Peggy Villearreal (a.k.a. Price), in which she purportedly recanted her testimony that Richey threatened to "torch" part of "A building." Affidavit of Peggy Villearreal [R. 3], p. 4, ¶¶ 19-20.[3] But in her deposition, she claimed that she did not prepare the affidavit and that to be accurate the affidavit should have read that she no longer remembers Richey

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[3] Peggy is also known as Peggy Price, Peggy Villearreal, and Mary Margaret Villearreal.

making the threats, not that Richey in fact did not make the statements. Deposition of Mary Margaret Villearreal [Tab A], pp. 16, 18. Indeed, not only did Villearreal give written statements before trial and testimony at trial that Richey threatened to burn the building down, but even in correspondence with Richey after the trial she reiterated that Richey had made such threats. Deposition of Mary Margaret Villearreal, [Tab A], Defendant's Exhibit 10, p. R000992 ("Shirley told me you didn't remember saying `that before the night was over part of A Building was going to burn down.' You did, then you went in the kitchen and got either a bottle of wiskey (sic) or wine and left. I thought you would hate me forever for having to say it in court").

C. Richey's allegations, even if true, fail to demonstrate actual innocence.

For the most part, Richey ignores the lay witness testimony and circumstantial evidence of his guilt. Thus, this Court must presume correct that Richey had a motive for setting the fire, opportunity to obtain accelerants from the greenhouse while he was stealing flowers, opportunity to set the fire when he babysat the victim, Cynthia Collins, and made threats to commit the crime as well as a statement bragging that he committed the crime. Instead of attacking this evidence, Richey focuses on the experts from the State Fire Marshall's Office.

Richey's actual innocence claims can be distilled into two distinct concepts. He first uses his new expert chemist, Andrew Armstrong, to question the reliability of the State's testimony that the carpet in Hope Collins' apartment contained traces of gasoline and paint thinner and the wood on Hope's balcony contained evidence of paint thinner. Armstrong cannot say that these accelerants are not present in the samples tested by the State - he argues that the evidence available for his review does not conclusively demonstrate

their presence in the samples. And then Richey employs his arson expert, Richard Custer, for the opinion that if Dr. Armstrong is correct that the State's evidence does not show the presence of accelerants, then the State cannot conclusively rule out accidental causes of the fire.

What will become plain to the Court upon review of Richey's experts statements (both in their affidavits and their depositions) is one simple, irrefutable fact: the experts cannot say whether the fire was caused by arson or accident. Given the applicable standard, even when Richey's proposed evidence is accepted as true, he fails to carry his burden of demonstrating actual innocence.

(1) *Dr. Armstrong cannot rule out the presence of accelerants in the samples from Hope Collins' carpet and the wood from her balcony.*

Three of the samples examined by the State's trial experts tested positive for the presence of accelerants. Two different samples of the carpeting from Hope's apartment revealed the presence of accelerants, one sample containing gasoline and the other paint thinner. Arson Crime Laboratory Report, July 28, 1986 (Sample 4 was taken from the carpet and padding from the living room three feet west of the hallway, while Sample 5 was taken from the carpet and padding in the center of the living room carpet). The wood sample from the balcony revealed the presence of paint thinner. Arson Crime Laboratory Report, July 28, 1986 (Sample 7 was from the balcony four inches from the south edge). See generally, Transcript of Proceedings [R. 26] (Vol. III, pp. 831-836) (testimony of Dan Gelfius concerning his lab results).

Dr. Armstrong disputed the State's findings in an April 26, 1996 affidavit as well as a deposition conducted on June 28, 1999. He concluded that, "Based on the available data, paint thinner cannot be identified in Sample 7." Affidavit of

Andrew Armstrong [R. 3], p. 6, ¶16c. As for Sample 5, Dr. Armstrong opined that the State could not say with scientific certainty that the sample contained gasoline because the gas chromatogram produced by the State did not contain the "five peak component pattern" required by a standard adopted three years after the State's testing was performed. Affidavit of Andrew Armstrong [R. 3], p. 7, ¶17a. He conceded that Sample 5 "does correspond slightly to the gasoline standard provided in the 1986 report," but that if it is gasoline it would be a "low level of evaporated gasoline." Affidavit of Andrew Armstrong [R. 3], p. 8, ¶17f.[4] And with respect to sample 4, Custer disputes the State's conclusion that it contained paint thinner because Custer could only discern four of the five necessary alkanes to conclude that paint thinner was present. Affidavit of Andrew Armstrong [R. 3], p. 9, ¶18c. In his deposition, Custer conceded that if he had a greater library of standards to check his results against and was very comfortable with the testing equipment, then he would be comfortable in finding paint thinner in Sample 4 despite the absence of the fifth alkane, though Custer disputed that the State's equipment could provide such comfort. Deposition of Andrew Armstrong [Tab B], p. 71.[5]

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[4] In his deposition, Armstrong stated that a finding of gasoline would not have been indicative of accelerant on the carpet because it was probably contaminated when the carpet was retrieved from the dump and placed on an asphalt surface near a gas pump. Deposition of Andrew Armstrong [Tab B], pp. 85-86. But the photographic evidence as well as the testimony of Steven Stechschulte demonstrate that the carpet was some 35 - 40 feet away from the pump. Deposition of Steven Stechschulte [Tab C], p. 164.

[5] Richey claims that the State led the trier of fact to believe that the two samples containing paint thinner (one from the carpet and one from the wood chips) had the same source, and thus there was no chance of

In his deposition, Dr. Armstrong clarified that his opinion was that, based on the evidence available for him to inspect, the State's experts did not meet their burden of proving the presence of accelerants to a scientific certainty:

- I have one test, one piece of data that survived. And I am trying to state to a scientific certainty something happened. And there is insufficient data to do that. Deposition of Andrew Armstrong [Tab B], p. 59;
- This data does not conclusively prove that it was paint thinner. Deposition of Andrew Armstrong [Tab B], p. 68.
- But there's just not sufficient information in [Sample 4] ... to conclude that this is paint thinner. Deposition of Andrew Armstrong [Tab B], p. 74.
- But he has not scientifically proven that Sample 5 has the stuff in it based on the analytical data that's been presented. He didn't prove his case to a scientific certainty. Deposition of Andrew Armstrong [Tab B], p. 93.

contamination at the dump. Motion for Evidentiary Hearing, p. 11. But Cryer merely offered that both samples contained the same substance (paint thinner), and the fact that paint thimer was found on the wood chips, which had not been taken to the dump, still confirmed the presence of accelerants Transcript of Proceedings [R 25] (Vol. II, Tr. 806). In fact, Cryer conceded that if paint thinner had been dripped on the carpet at the dump there would be no way for him to tell that the paint thinner came from the dump as opposed to being poured on the carpet while in the apartment. Transcript of Proceedings [R. 25] (Vol. II, Tr. 806-807). Also, the State's chemist never opined that the two samples came from the same source, and he admitted that not all paint thinners are the same and that testing would not be able to tell if the sample perfectly matched a known source. Transcript of Proceedings [R. 26] (Vol. III, Tr. 836, 854-855).

At several points Armstrong indicated his frustration at not having all of the records and data concerning the State's tests to evaluate the State's results: "And why not have the records of all of the analyses, of all the appropriate analyses for comparison. I had no solvent blanks available to look at. There's a lot of things I don't have. But I am looking only at this analytical data." Deposition of Andrew Armstrong [Tab B], p. 61.

While Armstrong suggests that the State's tests may have shown the presence of other products (such as lamp oils, insecticides, furniture polish, etc.), he could not rule out that the samples contained accelerants as identified by the State's experts; he merely opines that the State's experts have not sufficiently proven their case.

(2) *Richard Custer cannot rule out arson as a possible cause of the fire.*

In his affidavit, Custer criticized the State's arson investigator, Mr. Cryer, and the support for his conclusion that the fire was caused by arson Custer disputed that the "pour patterns" observed by Cryer were indicative of a poured accelerant, as Custer posited an alternative explanation that could have caused the irregularly shaped patterns. Affidavit of Richard Custer [R. 3], pp. 4-5, ¶10b. Custer also stated that the burning in the grooves of the wood on the balcony was also not necessarily indicative that an accelerant had been poured on that surface. Affidavit of Richard Custer [R. 3], pp. 5-6, ¶10c. And he disputed that the color of the ash and the speed with which the fire spread were accurate indicators of arson. Affidavit of Richard Custer [R. 3], p. 6, ¶10d. Custer then concluded, based on his review of Peggy Price's statement, that the fire was "just, if not more,

likely ... started by the careless discard of smoking materials or child's play." Affidavit of Richard Custer, p. 9, ¶12f.[6]

In his deposition on July 12, 1999, Custer revealed the bases for his opinion. Deposition of Richard Custer [Tab D]. He admitted that he spoke to no witnesses about the case (p. 38); that he read only one lay witness statement (Peggy Price's statement) (p. 39); that he was unable to view the scene as the State's arson investigator did (p. 38); that he may or may not have reviewed statements made by firemen on the scene (p. 36); and that ultimately his opinion was confined to the materials provided to him by Richey's counsel (p. 39).

But even more important than Custer's failure to consider all of the evidence available to the State's arson investigator is the weakness of Custer's ultimate opinion on the cause of the fire. Custer opined that the arson was the result of either careless discard of smoking materials or child's play — not because he found affirmative evidence that this was the cause - rather, this was the probable cause because in his view the State's evidence did not rule it out:

Q: You talked about a dropped cigarette being a likely scenario for the start of the fire; is that right?

A: Yes. That's not been eliminated.

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[6] We find it incredible that Custer would rely solely on Peggy Villearreal's statement (apparently the only one provided by Richey's counsel) for his conclusion of an accidental cause, but not consider the numerous witnesses who testified for the State concerning Richey's motive to set the fire, his access to accelerants, his opportunity to set the fire as the last person in the apartment, and his statements threatening to burn down the building and admission that he set the fire.

Q: Upon what do you base your conclusion that that could be a likely scenario for the cause of this fire?

A: The statements, information relative to the smoking habits of the people who were in there.

Q: Where did that come from?

A: There's evidence that there is a smoker in there.

Q: That doesn't mean she accidentally discarded the smoking material?

A: It doesn't mean that she didn't either.

Q: Without the couch being there, what basis do you have to say that a lit cigarette started the fire?

A: In my opinion that's equally likely that it was incendiary based on the evidence that I've seen, the results of the laboratory tests.

* * * *

Q: Isn't it just as likely that the sofa could have been consumed in the manner you indicated in the photograph in Exhibit 10 resulting from direct flame impingement upon the sofa from the burning carpet in front of the sofa?

A: **It could go either way. There's really no way to tell.**

Q: And there's no way to tell that this was done by virtue of a cigarette in the sofa, is there?

A: **No, from the physical evidence, there's no way to tell either one or the other.**

Deposition of Richard Custer [Tab D], pp. 76-78 (emphasis added).

Custer went on to clarify that he did not even know if his theory that the fire could have originated from a smoldering

cigarette lodged in the sofa is theoretically possible as he did not review photographs of the sofa nor did he know whether the sofa even had cushions between which a cigarette could be lodged. Deposition of Richard Custer [Tab D], pp. 72, 106-107.

Custer also conceded that if the State's experts were correct about their analysis of the carpet and wood from the balcony, then Custer would agree that the fire was caused by arson. Deposition of Richard Custer [Tab D], pp. 78-79.

D. When the Court applies the law to the facts as developed, the Court will find that there is no evidence of actual innocence.

Having reviewed the facts as found by the Ohio courts as well as Richey's "newly-discovered" evidence, the Court will find that Richey fails to demonstrate actual innocence. His evidence does not even purport to exclude the possibility that he set the fire that killed Cynthia Collins - his evidence is only an attack on the State's *scientific* evidence of arson and his conclusion that such evidence is not sufficiently sound to prove that the fire was an arson. And again, to do this Richey needs this Court to ignore the other witnesses who testified at trial to Richey's motive, opportunity, and admissions. This Court cannot exclude the consideration of such evidence in its analysis. Schlup v. Delo, 513 U.S. at 332 (newly presented evidence must be assessed "in connection with the evidence of guilt adduced at trial").

In this respect, Richey's case resembles the one that confronted the court in Satcher v. Pruett, 126 F.3d 561 (4th Cir.), cert. denied, stay denied, 522 U.S. 1010 (1997). Satcher had been sentenced to death for the rape, robbery and capital murder of Ann Borghesani. Id. at 563. At trial, test results revealed that the semen sample recovered from the victim matched Satcher's DNA; the pubic hairs found on the victim did not match Satcher; and other test results were

inconclusive. Id. at 564. In federal habeas, Satcher introduced reports from experts who conducted DNA testing of Satcher's blood to compare to the results obtained by the State's DNA testing of the semen found in the victim. Id. at 570. Satcher's experts concluded that the State could not claim with scientific accuracy that Satcher was a "four-probe" match for the DNA found in the semen and that the State's test results fell outside their own range of match criteria. Id.

The district court and the Fourth Circuit rejected Satcher's actual innocence claims. Of particular relevance to this case, the Fourth Circuit noted that Satcher's new evidence did not demonstrate innocence. Satcher's evidence did "not show that someone else was the source of the DNA sample taken from the crime scene.... None of the experts conclude that Satcher did not contribute the DNA from the sample taken from Borghesani." Id. at 570. "It would be a different matter if, as Satcher argues, his new DNA evidence showed that he was definitely not the contributor of the DNA on the swab taken from the crime scene. **But his new evidence suggests, at best, that Virginia's test was inconclusive**." Id. at 571 (emphasis added).

This is exactly the sum total of Richey's expert opinions – according to them, the State's evidence of accelerants was inconclusive and the scientific evidence of arson was inconclusive. Indeed, Richey's evidence is even weaker than Satcher's. For in Satcher's case, the semen recovered from the victim had to be from the perpetrator, and thus his new evidence went directly to the absolute proof of who committed the crime. Thus, if Satcher's evidence could disprove that he deposited the DNA, he could prove his innocence. In Richey's case, even if one accepts his conclusions as true that the testing for accelerants was inconclusive and the State's arson investigator could not rule out accidental cause, it does not prove Richey's innocence.

The presence of gasoline and paint thinner on the samples tested by the State was not necessary to prove Richey's guilt - in Satcher, on the other hand, the DNA had to be Satcher's to prove his guilt.

Satcher is also instructive on the more narrow inquiry the Court must make in dealing with this motion. The Fourth Circuit held that the district court did not abuse its discretion in refusing to hold an evidentiary hearing because the court reviewed Satcher's evidence and concluded that it did not prove innocence, merely disagreement between the experts:

> The district court refused to have an evidentiary hearing, but it did so only after reviewing the affidavits and concluding that his evidence was not sufficient to show actual innocence. It was within the court's discretion to conclude that the new evidence created only a "disagreement between experts" that would not satisfy the Schlup standard.

Id. at 571 n.5.

In this case, the state courts made a specific finding that the evidence did not support Richey's actual innocence claims:

> Even if the trial experts' analyses of the available data were erroneous, such error does not destroy the state's case against Appellant. Furthermore, the "newly-discovered evidence" presented by Appellant does not by itself establish his actual innocence. The mere absence of accelerants in the articles tested is not conclusive proof that Appellant is innocent of the crime of arson. There is other evidence in the record which supports the verdict of the jury (sic).

State v. Richey, Putnam App. No. 12-97-7, p. 4 (November 18, 1997) [R. 39, Exhibit 77]. Richey's new evidence presents a "disagreement between experts." And even if the disagreement were resolved in Richey's favor, he would still be left without evidence of actual innocence. An evidentiary hearing is therefore not required.

The state courts' findings of facts are still entitled to a presumption of correctness even though there was no evidentiary hearing in the post-conviction proceedings in state court. Mitchell v. Rees, 114 F.3d at 576 (presumption applies to appellate court's statement that "the facts of the present case did not adequately support respondent's claim," quoting Sumner v. Mata, 449 U.S. 539 (1981)); Carter v. Johnson, 110 F.3d 1098, 1106-1107 (5th Cir.) (presumption still applies to state court disposition based on consideration of affidavits without live testimony), cert. granted, vacated and remanded on other grounds, __ U.S. __ , 118 S.Ct. 409 (1997).

III. Richey Is Not Entitled to a Hearing on his Ineffective Assistance of Counsel Claims.

A. Trial counsel's strategy for handling the State's evidence of arson was sound; counsel were not ineffective in relying on an independent, qualified expert and in not "shopping" for a more favorable opinion.[7]

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[7] Before addressing Richey's request for an evidentiary hearing on his ineffective assistance of trial counsel claims, we note that Richey's habeas corpus petition lacks such a ground for relief, though his Introduction mentions ineffective assistance of trial counsel regarding the retention of an independent arson expert, L. Gregory DuBois. Petition for Writ of Habeas Corpus [R. 1], p. 4. We will presume for purposes of this motion that the Court will treat the reference in the Introduction as a ground for relief, or, in the alternative, assume that Richey will file an amended petition as of right that includes such a claim. Fed.R.Civ.Proc. 15(a) ("party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served....").

Richey's ineffective-assistance claim dovetails with his actual innocence claim in the sense that Richey faults trial counsel for not "shopping around" until they found Dr. Armstrong in Texas and Mr. Custer in Maryland. Yet, the state courts made explicit findings on this issue, which are presumed to be correct. Moreover, the discovery conducted in this case confirms that Richey's trial counsel functioned as counsel in the Sixth Amendment sense and did not perform deficiently in their handling of the arson evidence.

The guiding standard for the Court's consideration of this claim is, of course, Strickland v. Washington, 466 U.S. 668 (1984), in which the United States Supreme Court held that any habeas corpus claim of ineffective assistance of counsel must establish both deficient performance and prejudice:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. at 687.

This Court need look no further than the first prong, deficient performance, in dispatching this claim without an

evidentiary hearing. Milone v. Camp, 22 F.3d 693, 703-704 (7th Cir. 1994) (court "need not address both Strickland prongs if it is clear that [defendant] cannot satisfy one of them: There is no need to discuss prejudice if counsel's performance was not deficient, and there is no need to evaluate counsel's performance if there was no prejudice resulting from counsel's actions"), cert. denied, 513 U.S. 1076 (1995).

The lynchpin for Richey's attack on counsel is their reliance on an expert, L. Gregory DuBois, who did not do his own testing.[8] Richey thus attacked the expert as incompetent and attributed that incompetence to trial counsel. The state courts properly rejected this claim. The post-conviction trial court found as a fact that Mr. DuBois was a qualified expert. Findings of Fact and Conclusions of Law [R. 38, Exhibit 73], p. 6, Findings of Fact, ¶3. The court noted that Richey's claim was based on the assertion that DuBois did not conduct any independent testing, so counsel were incompetent for relying upon him. Findings of Fact and Conclusions of Law [R. 38, Exhibit 73], p. 6, Findings of Fact, ¶4. The trial court applied constitutional law to the facts and held that any failings of an expert cannot be directly attributed to trial counsel and that

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[8] Elsewhere in his motion, Richey attacks DuBois' qualifications, Motion for Evidentiary Hearing, pp. 29-30, but Richey did not present this theory to the state courts. Indeed, the post-conviction trial court made a specific finding that Richey did not contest DuBois' qualifications. Findings of Fact and Conclusions of Law [R. 38, Exhibit 73], p. 6, ¶2 ("Richey fails to attack Mr. DuBois' qualifications"). Moreover, in his deposition DuBois revealed his qualifications, which included membership in ASTM. Deposition of L. Gregory DuBois [Tab E], p. 16. Mr. DuBois was also a member of the International Association of Arson Investigators at the time he was retained. Id. at 20. Before 1987, his company was involved in approximately 400-500 fire investigations and DuBois had an active role in "almost all of them." Id. at 42. In 1986 alone, DuBois was involved in ten to thirty arson investigations, id. at 49, and less then one hundred such investigations before 1987 in total. Id. at 158.

trial counsel had no duty to continue to search for an expert to contradict the state's experts when his independent expert agreed with the state. Findings of Fact and Conclusions of Law [R. 38, Exhibit 73], pp. 6-7, Conclusions of Law, ¶¶2-3. On appeal, the state court of appeals agreed that any failings on the part of counsel's expert could not be attributed to counsel in this case and that counsel did not perform deficiently in light of their retention of an expert and strategy in casting doubt on the State's evidence. State v. Richey, Putnam App. No. 12-97-7, p. 6 (November 18, 1997) [R. 39, Exhibit 77].

The Ohio courts reasonably applied Strickland v. Washington to the facts in this case. First of all, there is no such thing as ineffective assistance of an expert witness. Wilson v. Greene, 155 F.3d 396, 401 (4th Cir.), cert. denied, 525 U.S. 1012 (1998). And counsel are entitled to rely upon the opinions given by properly selected experts – there is no duty to continue to "shop" for an expert. The Eighth Circuit affirmed this principle in Sidebottom v. Delo, 46 F.3d 744, 753 (8th Cir.), cert. denied, 516 U.S. 849 (1995), where the petitioner used a new expert's opinion to argue that his trial expert performed incompetently by not conducting an adequate evaluation. The court held that Sidebottom was attacking the wrong person — the focus should have been on counsel. Id. With the proper focus, the court held that there was no constitutional violation: "We have never suggested [that] counsel must continue looking for experts just because the one he has consulted gave an unfavorable opinion." Id. (citations omitted). Counsel must be entitled to rely upon their experts, for "if an attorney has the burden of reviewing the trustworthiness of a qualified expert's conclusion before the attorney is entitled to make decisions based on that conclusion, the role of the expert becomes superfluous." Hendricks v. Calderon, 70 F.3d 1032, 1039 (9th Cir. 1995), cert. denied, 517 U.S. 1111 (1996). There is no need for an evidentiary hearing

to resolve the claim because the record before the Court already confirms that counsel did not act deficiently.

Not only are the state court's conclusions supported by the record before it, but the discovery in this case has confirmed that counsel did not perform deficiently in their handling of the state's arson evidence. Moreover, Richey's trial expert has now explained why he did not conduct independent testing, which buttresses the state court's conclusions.

Trial counsel William Kluge was responsible for handling the State's arson evidence and he retained DuBois to test the validity of the State Fire Marshall's conclusion that the fire was an arson. Deposition of William F. Kluge [Tab F], p. 13. Richey has questioned the expert's competence for not conducting his own tests, but even Richey's expert agrees that such testing would have been meaningless.

When asked why he did not conduct independent testing of the samples to compare with the state's findings, DuBois could not remember the exact reason for not testing, but he recalled several reasons for why he did not perform the testing. The first reason was that by the time he was reviewing the evidence the

> samples were nearly six months old, and it's my thinking that that probably, in my mind, would have been too long of a time period to reperform the analyses. If I had gotten different results, I wouldn't have known whether or not the difference in the results were because the samples were actually different than what the State Fire Marshall laboratory analyses had shown earlier that year. . . . I wouldn't have known whether or not the differences were because the samples had changed in the six months or whether they were, indeed, different.

Deposition of L. Gregory DuBois [Tab E], p. 84.[9]

The record substantiates DuBois' recollection concerning the time frame because at the point that DuBois met with Kluge and received the State Fire Marshall's reports, more than five months had passed since the fire (June 30, 1986) and more than four months had passed since the state conducted its testing. Deposition of L. Gregory DuBois [Tab E], p. 72 (DuBois received reports on December 4, 1986); Transcript of Proceedings [R. 26] (Vol. III, Tr. 830) (testimony of Dan Gelfius that the State conducted its testing of the samples from the carpet and balcony on July 22, 1986).

Indeed, even Richey's chemist agreed that the State's extraction from the carpet and wood chips "would be good perhaps three months" and by that time would "[m]ore than likely evaporate." Deposition of Andrew Armstrong [Tab B], pp. 87-88. When asked if a five month period would have been adequate to retest from the carpet and wood chips, Armstrong said "Not in this case...." Deposition of Andrew Armstrong [Tab B], p. 88. Having conceded these facts, Armstrong was left with criticizing DuBois for not documenting in the file made available to Armstrong that DuBois had confirmed these facts with a chemist. Deposition of Andrew Armstrong [Tab B], p. 89.

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[9] DuBois gave two additional reasons that may have factored into his decision not to conduct testing. He may have also considered that the potential budget for his work in the case would not have been sufficient to contemplate retesting, and when he visited the State Fire Marshall's Office he may have learned that there was some other scientific reason that a duplicate analysis could no longer be performed. Deposition of L. Gregory DuBois [Tab E], pp. 28, 84-85. Given that the deposition occurred some thirteen years after the fact, DuBois could not recall with certainty.

While DuBois did not conduct futile testing, he did test the State's arson conclusions by examining the photographs, inspecting the arson -lab, their reports, and their evidence used in concluding that accelerants were present in the samples they tested; indeed, he sat down with chemist Dan Gelfius to go over each of the state's conclusions and comparisons. Deposition of L. Gregory DuBois [Tab E], pp. 174, 178.

In light of the opinion from DuBois confirming the validity of the State's finding, Kluge pursued the only reasonable strategy then available to him by concentrating on the State's evidence of the arsonist's identity:

> Well, the first strategy was to hire an expert to review all of the evidence, and having hired an expert and having been assured by him that he reviewed everything Cryer had done, we talked about that, and then at that time, once he confirmed that everything Cryer had done was accurate and appeared to be in order, we decided at that point not to use him. At that time, however, he was there in Putnam County at the time the trial was going on. So to combat the arson diagnosis of Cryer, we really kind of down-played that to the extent that they still had to prove that Kenny is the one who had climbed into the apartment, that Kenny is the one who had stolen the accelerant, that Kenny is the one who poured the accelerant and so forth and started the whole fire. And there was no evidence of that other than circumstantial evidence.

Deposition of William Kluge [Tab F], pp. 20-21; see also Transcript of Proceedings [R. 27], (Vol. IV, Tr. 1028-1057) (defense closing argument).

And contrary to what Richey would have this Court believe, counsel did question whether the carpet could have been contaminated. Transcript of Proceedings [R 26] (Vol. III, Tr. 792-793, 806-807). Moreover, the State on its own disclosed

the location of the carpet before testing. Transcript of Proceedings [R. 25] (Vol. II, Tr. 641-642, 766). Trial counsel also highlighted the lack of any accelerants on Richey's clothing, duffel bag and arm bandage. Transcript of Proceedings [R. 26] (Vol. III, Tr. 840-842).

Richey also assails his trial counsel's strategy regarding the identity of the arsonist by claiming that trial counsel should have blamed the victim for causing the fire. Motion for Evidentiary Hearing, pp. 23-24, 34. To do this, counsel should have introduced evidence that the victim had caused at least one fire before her death. Affidavit of Peggy Villearreal [R. 3], ¶¶9-13; see also Supplemental Discovery (December 18, 1986) [R. 30, Exhibit 9] (indicating an oral statement from Hope Collins that Cynthia had on one occasion used a match to start a fire on a sheet).

There are several problems with this strategy. First of all, the State had evidence of accelerants on the carpet and the balcony and the independent defense expert concurred in the analysis. Second, the fire broke out at around 4:15 a.m., long after the child had gone to sleep. Transcript of Proceedings [R. 24] (Vol. I, Tr. 83) (Hope testified that Cynthia was asleep when Hope got back to the apartment between 11:00 p.m. and 11:30 p.m.). Thus, counsel's theory would have been that despite the presence of accelerants and no explanation for the child's access to same, the child woke up in the middle of the night to set the fire and then return to her room. It was eminently reasonable trial strategy for defense counsel to refrain from attacking the two year-old victim as a firebug in the face of overwhelming and uncontradicted testimony that the fire was caused by the use of accelerants. See Transcript of Proceedings [R. 27] (Vol. IV, Tr. 1028-1057) (trial counsel's closing argument, which centered on identification with recognition that proof of arson was unrefuted; see also pages 1029, 1031, 1043, 1045, 1052, 1056-57, in particular).

B. Trial counsel were not ineffective in their handling of the evidence concerning the smoke detector.

At several points in his motion, Richey attacks trial counsel for not introducing evidence that Hope Collins had disconnected her smoke detector the night of the fire to stop it from beeping while she cooked.[10] Richey claims that this would explain why thee detector apparently did not sound and was hanging from its wires after the fire. Motion for Evidentiary Hearing, pp. 24, 34. Richey relies upon an affidavit from Peggy Villearreal that she informed defense counsel of this information. Affidavit of Peggy Villearreal [R. 3], p. 3, ¶¶14-18.

The first thing to note is that Peggy "thinks" that she told attorney Donohue about this information. Affidavit of Peggy Villearreal [R. 3], p. 3, I N14-18. Coming some seven years after the trial, and considering Peggy's other problems remembering things (see generally Deposition of Mary Margaret Villearreal [Tab A], (containing at least fifty-eight uses of the phrase "I don't remember" when asked about her affidavit and trial testimony)), her uncertainty is hardly credible evidence. Moreover, attorney Donohue testified that not only did he not remember Peggy telling him this,

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[10] Elsewhere in his motion, Richey floats the contradictory theory that the smoke detector was hanging from its wires because it melted away from the housing due to the intense heat. Motion for Evidentiary Hearing, p. 9 (citing Affidavit of Richard Custer, ¶12e). Aside from the obvious inconsistency with the above explanation, Custer was not at the fire scene and appears to rely solely on trial testimony for his melting theory. See id. (citing as the source for his conclusion trial testimony indicating that the smoke detector was hanging down by its wires); compare Transcript of Proceedings [R. 26] (Vol. III, Tr. 813) (testimony from Mr. Cryer that based on his examination of the detector and the ceiling he saw no evidence confirming that heat could have pulled the screws from the detector out of the plasterboard).

Deposition of Gregory W. Donohue [Tab G], pp. 13-14, but his notes with Price do not reflect such information and Donohue said that he would have likely made such a notation if Peggy said that. Deposition of Gregory W. Donohue [Tab G], p. 15.

Even if Peggy did tell counsel about this, it does not explain why the smoke detector did not sound, it in no way refutes the State's theory on how Richey disabled the smoke detector, and it is flatly contradicted by Hope Collins (now Hope Sterling).

At trial, Robert Cryer testified that Hope Collins' smoke detector was found dangling from two wires about eight inches below the ceiling. Transcript of Proceedings [R. 26] (Vol. III, Tr. 753). Hope Collins testified at trial that she believed that the smoke detector was working the day of the fire. Transcript of Proceedings [R. 24] (Vol. I, Tr. 111). At her deposition recently, Hope reaffirmed this belief. Deposition of Hope Sterling [Tab H], p. 58.

Hope also clarified that she did not disconnect the smoke detector to keep it from beeping - there were two ways to stop it from beeping: (1) flip the switch in the fuse box; or (2) fan the smoke away from the detector. Deposition of Hope Sterling [Tab H], p. 84. In neither event did Hope need to pull the smoke detector down from the ceiling. When she had to fan the smoke away from the detector, she sometimes unhooked the cover and let it swing down on its hinges (Deposition of Hope Sterling [Tab H], pp. 42-43, 84), but she did not need to unscrew the smoke detector and let it dangle from its wires.

Peggy's information also does nothing to refute the State's theory that Richey had thrown the smoke detector's breaker in the fuse box. Transcript of Proceedings [R. 26] (Vol. III, Tr. 1059-1060). The State demonstrated at trial that

Richey knew about how to cut off the power to the smoke detector by throwing the breaker in the fuse box. Transcript of Proceedings [R. 24] (Vol.1, Tr. 112-113).

Even Hope's testimony that she sometimes threw the breaker switch to stop the alarm is not helpful to Richey for at least two reasons. First, Hope testified that she would throw the breaker for about fifteen seconds and then turn it back on to reset the alarm. Deposition of Hope Sterling [Tab H], p. 45. Second, even if she left the circuit breaker off, it is highly unlikely that it remained off for the duration of the evening because that breaker also controlled the power to the back half of her apartment, including her lights. Transcript of Proceedings [R. 24] (Vol. I, Tr. 110, 112-113). Hope testified at trial that she returned to her apartment the night of the fire and made herself something to eat in the kitchen at about 2:00 a.m. Transcript of Proceedings [R. 24] (Vol. I, Tr. 91). If the circuit breaker were still off, she would have been doing this in the dark. In any event, Richey does not seem to argue this alternative.

Richey fails to demonstrate that trial counsel were aware of the information concerning the smoke detector, and even if we assume that counsel were aware of this information, it in no way detracted from the State's evidence concerning how Richey disabled the smoke detector. Moreover, to the extent that he is arguing that Peggy's information would have aided in the establishment of a mitigating factor (that Richey tried to save the child), an evidentiary hearing is not available in federal habeas. Burris v. Parke, 116 F.3d 256, 258 (7th Cir. 1997) (interpreting 28 U.S.C. §2254(e)(2) to preclude evidentiary hearings on claims relating to the death penalty in a capital case); Rodriguez v. Zavaras, 42 F.Supp.2d 1052, 1057 (D.Colo. 1999) (citing and discussing Burris and other district courts reaching this conclusion).

C. Richey fails to demonstrate that appellate counsel in his direct appeal to the court of appeals were ineffective, and because he fails to point to any prejudice, there is no need to hold a hearing.

Richey mentions in the course of describing the state proceedings that appellate counsel on direct appeal labored under a conflict of interest that caused counsel Kenneth Murray to be ineffective. Motion for Evidentiary Hearing, pp. 34-35. Both parties pursued discovery in connection with this claim. The depositions constitute a sufficient record for this Court to decide the claim, and thus no hearing is necessary.

Richey relies primarily upon Kenneth Murray's affidavit in support of this claim. Mr. Murray states his belief that his supervisor, David Stebbins, instructed him not to raise claims of ineffective assistance of trial counsel because trial counsel Kluge was Stebbins' friend. Affidavit of Kenneth Murray [R. 3], p. 2, ¶6. This statement is relevant in determining whether counsel performed inadequately, but Murray clarified in his deposition that Stebbins instructed him not to raise ineffective-assistance-of-trial-counsel issues because they would be raised later in the post-conviction proceedings. Deposition of Kenneth Murray [Tab I], p. 28. But the Court need not decide whether there was a conflict at all. For Murray cannot identify a single issue that he purposely left out of the brief because of Stebbins' instructions. Deposition of Kenneth Murray [Tab I], pp. 24, 26; Affidavit of Kenneth Murray [R. 3], pp. 4-5, ¶¶12-15 (discussing claims raised in application for reopening and not listing a single claim that Murray wanted to raise but did not because of Stebbins). Indeed, Murray says that he inserted three or four claims in the brief because "they were hot issues or they were strong in the record." Deposition of Kenneth Murray [Tab I], p. 35.

Richey's failure to point to any specific prejudice means that the Court need not consider the first prong (deficient performance), nor must the Court hold a hearing.

D. Conclusion regarding ineffective assistance of counsel

Richey fails to demonstrate, even if the truth of his assertions are correct, that the Ohio courts' application of Strickland v. Washington principles to this claim was so unreasonable that it would not even be debatable among reasonable jurists, meaning that the Ohio courts' decision was so offensive to Strickland, so devoid of record support, or so arbitrary, as to indicate that it is outside the universe of plausible, credible outcomes. Nevers v. Killinger, 169 F.3d 352, 362 (6th Cir.), cert. denied, 119 S.Ct. 2340 (1999).

IV. Richey is Not Entitled to an Evidentiary Hearing to Retry All of the Facts in the Case.

Unlike the discrete actual innocence and ineffective assistance of counsel claims that Richey raises in the first section of his motion, section two is a free-ranging request to retry his case. In section II, Richey tells the story of his trial and direct appeal, pointing out along the way his version of the facts and highlighting the facts with which he disagrees. But Richey is simply not entitled to a retrial here to contest the State's evidence again.[11] To the extent that we could

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[11] For example, as will be seen in Respondent's Return of Writ, Richey may be relying upon ground nine of his Petition as support for retrying the scientific evidence of arson. In his Petition, Richey argues that his Fourteenth Amendment rights were violated by the trial experts' use of unreliable scientific methods to arrive at their "false" conclusions. Petition for Writ of Habeas Corpus [R. 1], p. 29 (arguing that because his experts disagree with the State's experts then the State presented false scientific evidence). Richey fails to cite a single case in support of this ground for relief - because there is no such claim. In any event, we address the underlying factual assertions in the claims of actual innocence and ineffective-assistance-of-counsel under the appropriate standards.

discern specific, cognizable grounds for relief in Richey's tale, we identified them in section III above and pointed out why an evidentiary hearing is not required.[12]

V. Conclusion

Richey has not demonstrated that he is entitled to an evidentiary hearing to resolve his claims. The record before this Court, as supplemented by the depositions and documents created through discovery, is sufficient for this Court to make its determination.

Even so, we agree that 28 U.S.C. §2254(e)(2) does not bar an evidentiary hearing in this case. And Richey is correct that even if he does not demonstrate *entitlement* to an evidentiary hearing, this Court may nonetheless retain discretion to order one. Sims v. Livesay, 970 F.2d 1575, 1579 (6th Cir. 1992); but see, Mitchell v. Rees, 114 F.3d at 577 (a "district court is without authority to hold an evidentiary hearing on a matter on which the state court has made findings unless one of the factors contained in [former] §2254(d) applies"). If the Court does order a hearing – despite what we believe to be ample documentary evidence showing that Richey cannot prevail at such a hearing as a matter of law – then we welcome the opportunity to demonstrate that his conviction is sound and that he cannot show any evidence of actual innocence here.

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[12] At page sixteen of his motion, Richey states that "[t]o the extent the Respondent does not contest these facts, Richey is simply entitled to relief based upon them." Perhaps Richey is confused about who bears the burden of rebutting the presumption of correctness that attends the state courts' finding of facts. It is Richey who bears this burden, by clear and convincing evidence, and he cannot meet this burden merely by giving his view of the facts and announcing that any failure to point out the state court's findings entitles him to relief. 28 U.S.C. §2254(e)(1). But, as stated above, we have addressed all claims we could identify lurking in Richey's story.

Respectfully submitted,

BETTY D. MONTGOMERY
Attorney General

/s/ Michael L. Collyer

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Respondent's Memorandum in Response to Richey's Motion for an Evidentiary Hearing** has been forwarded by regular first class U.S. mail this 10th. day of January, 2000, to counsel for petitioner, Paul E. Nemser and Kenneth J. Parsigian, GOODWIN, PROCTER & HOAR, Exchange Place, Boston, MA 02109.

/s/ Michael L. Collyer

MICHAEL L. COLLYER (0061719)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

KENNETH T. RICHEY,	)	CASE NO.
	)	1:98CV1418
	)	
Petitioner,	)	JUDGE
	)	PATRICIA A.
	)	GAUGHAN
	)	
v.	)	
	)	
BETTY MITCHELL, WARDEN,	)	ORDER DENYING
	)	MOTION FOR
	)	EVIDENTIARY
	)	HEARING
Respondent.	)	

Introduction

This matter is before the Court upon Petitioner's motion for an Evidentiary Hearing (Doc. 97). Petitioner asserts that an evidentiary hearing is necessary to introduce evidence that the experts who testified during Petitioner's trial gave false testimony and that counsel was ineffective for failing to obtain a competent expert. For the following reasons, the Motion is DENIED.

Facts

Kenneth Richey, Petitioner, filed the instant Motion to support two claims he asserted in his Petition for a Writ of Habeas Corpus. During Richey's direct appeal, the Ohio Supreme Court found the following relevant facts: Richey, Hope Collins, Collins' two-year-old daughter, and Candy Barchet, Richey's ex-girlfriend, all lived in the Old Farm Village Apartments in Columbus Grove, Ohio. *State v.*

Richey, 595 N.E.2d 915, 918 (Ohio 1992). Collins' apartment was directly above Barchet's apartment.

During their relationship, Richey stated to Barchet that he would "kill any other guys" if found with Barchet. *Id.* On the night of June 29, 1986, Hope Collins hosted a party that Richey, Barchet, and Barchet's new boyfriend attended. *Id.* at 919. Richey was visibly upset by their presence. *Id.* In fact, witnesses testified at trial about Richey's demeanor during the party and that he at one point stated, "If I can't have her, nobody else can." *Id.*

On that same night, Richey offered to break into K & J Greenhouse to obtain plants for one of the party guests. *Id.* Richey admitted to breaking into that establishment on a prior occasion to steal plants for Barchet. *Id.* The owner of K & J Greenhouse kept paint thinner and gasoline in two unlocked storage sheds. *Id.* at 920. The owner was uncertain whether any of these materials were missing from his premises. *Id.*

As the party concluded, Richey asked Collins several times if he could sleep on her couch. *Id.* at 919. Although she initially refused, she relented when Richey promised to babysit her sleeping daughter, Cynthia. *Id.* Around 4:15 am., neighbors reported smoke coming from the Collins apartment. *Id.* When firefighters arrived, Richey was screaming that a child was inside. *Id.* Firefighters were forced to restrain Richey from trying to enter the burning building. *Id.* Witnesses testified during trial that upon viewing the fire Richey stated, "It looks like I did a helluva good job, don't it" and made other incriminating statements to Barchet. *Id.*

During Richey's trial, several experts testified regarding the cause of the fire. Assistant State Fire Marshal Robert Cryer determined by the burn patterns that an accelerant had been used. *Id.* at 920. He further testified that the smoke detector had been pulled from the ceiling before the fire. *Id.*

He concluded that accelerant had been poured onto Collins' wooden deck, the point of origin of the fire, and onto her living room rug. *Id.* Richey's clothing, however, did not contain any traces of accelerants. *Id.* Gregory DuBois, a consulting engineer who Richey's counsel had initially retained to examine the test results, also testified at trial. *Id.* He concurred with Cryer that gasoline and paint thinner had been used as accelerants in the ignition and rapid spread of the fire. *Id.*

A three judge panel convicted Richey of all charges. *Id.* Richey unsuccessfully appealed the conviction to the Ohio Court of Appeals, the Ohio Supreme Court, and the United States Supreme Court. *State v. Richey*, 1989 WL 156562 (Ohio Ct. App. Dec. 28, 1989); *State v. Richey*, 595 N.E.2d 915 (Ohio 1992); *Richey v. Ohio*, 517 U.S. 1119 (1996). Thereafter, Richey filed a Petition to Vacate or Set Aside his Sentence pursuant to Ohio Rev. Code § 2953.21. Pet. Check., Tab 40. The court denied the petition on March 26, 1997,. pursuant to the State's Motion for summary judgment, without an evidentiary hearing. On May 14, 1997, the post-conviction court entered its findings of fact and conclusions of law. *State v. Richey*, No. CR86-21, slip op. at 4 (Ohio Ct. Common Pleas May 14, 1997).

In Richey's Opposition to the State's Summary Judgment Motion, Richey asserted, for the first time, that the court should grant him an evidentiary hearing because expert testimony proffered during trial was false based on reports he obtained from Professor Richard Custer, a fire investigator, and Dr. Andrew Armstrong, a Certified Professional Chemist. *Id.* Richey claimed that his newly obtained reports proved his actual innocence of Cynthia Collins' murder. *Id.* The post-conviction court denied that claim on several grounds. First, the court barred the claim as res judicata as it could have been raised on direct appeal. *Id.* Second, the court determined that

because Richey failed to raise an actual innocence claim in his post-conviction petition, this new claim was tantamount to an improper amendment of his petition. Finally, the court claimed that even if this claim were properly presented to the court, an actual innocence claim is not cognizable under Ohio law. *Id.* (citing *State v. Lott*, No. 66388 (Ohio Ct. App. Nov. 3, 1994)).

In addition to his actual innocence claim, Richey also requested an evidentiary hearing to prove his counsel was ineffective. Richey stated trial counsel was ineffective for: (1) failing to retain an expert who found the fire was not caused by arson; (2) failing to procure an expert to rebut the State's arson evidence; (3) listing DuBois as a defense expert even after learning DuBois's report was unfavorable to the defense; and (4) failing to call an expert to testify on Richey's behalf. *State v. Richey*, No. CR86-21 at 5-9. Nevertheless, the court denied Richey's Motion for an Evidentiary Hearing and granted the State's Summary Judgment Motion, finding some claims barred by res judicata and others insufficient on the merits. *Id.*

Standard of Review

To secure an evidentiary hearing, a state habeas corpus petitioner must first demonstrate that 28 U.S.C. § 2254(e)(2) does not bar an evidentiary hearing. That statute states:

> (e)(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court **shall not** hold a hearing on the claim unless the applicant shows that–
>
> (A) the claim relies on–
>
> (i) a new rule of constitutional law, made retroactive to cases

> on collateral review by the Supreme Court, that was previously unavailable; or (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2)(emphasis supplied).

While the Sixth Circuit has yet to interpret this statute, several other circuit courts have done so. In *Cardwell v. Greene*, 152 F.3d 331, 337 (4th Cir. 1998), the Fourth Circuit determined that "a federal court's first task in determining whether to grant an evidentiary hearing is to ascertain whether the petitioner has 'failed to develop the factual basis of a claim in State court.'" If a petitioner has not so developed the claim, then the court must deny a hearing absent one of the two narrow exceptions listed in sections (A) and (B) of the statute. *Id.* Honing in specifically on what constitutes a petitioner's "failure to develop the facts," the Fifth Circuit determined that the phrase "failed to develop" implicates some omission by the petitioner. *McDonald v. Johnson*, 139 F.3d 1056, 1059 (5th Cir. 1998). Hence, the petitioner "cannot be deemed to have failed to develop a factual basis for his claim if the basis was left undeveloped through no fault of his own." *Id.* Other circuit courts deciding this issue have joined the Fourth and Fifth Circuits in holding that some inaction on

the petitioner's part must be present to preclude an evidentiary hearing. *See Burris v. Parke*, 116 F.3d 256 (7th Cir. 1997)(holding § 2254(e)(2) does not bar district court from granting hearing when state court refused to hear petitioner's collateral attack on sentence); *Jones v. Wood*, 114 F.3d 1002 (9th Cir. 1997)(concluding Anti-Terrorism and Effective Death Penalty Act ("AEDPA") did not preclude a federal evidentiary hearing merely because state court refused to conduct hearing); *Love v. Morton*, 112 F.3d 131 (3rd Cir. 1997)(determining 28 U.S.C. § 2254(e)(2) did not prevent evidentiary hearing when factors beyond petitioner's control caused failure to develop state court factual record).

Clearing the initial § 2254(e)(2) hurdle, however, does not entitle a habeas petitioner to a hearing. Instead, a court must then subject the petitioner's request to the standard articulated under pre-AEDPA law in *Townsend v. Sain*, 372 U.S. 293 (1962). In *Townsend*, the Court enunciated six circumstances in which a habeas court must grant a petitioner's request for an evidentiary hearing:

> If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

Id. at 313. *Townsend* was partially overruled by *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992). In *Keeney*, the Court held that a habeas petitioner must show both cause and prejudice for failing to fully develop the facts in state court. Aside from

the *Townsend* and *Keeney* mandates, however, a habeas court may use its discretion in determining whether an evidentiary hearing is necessary. R. Governing Section 2254 Cases 8.

Discussion

Although the post-conviction court refused to grant Richey a hearing, Richey did attempt to develop the factual basis for his claims in state court. Thus, according to prevailing law, Richey is not barred from obtaining an evidentiary hearing. Under *Townsend* and *Keeney*, however, the Court need not grant Richey an evidentiary hearing because the need for a hearing is obviated by utilizing other means of obtaining the proffered evidence for the record.

Specifically, the Court already has permitted, and counsel has taken, numerous depositions in this case pursuant to Rule 6. (Docket Nos. 42, 44, 49, 71, 83, 84). The Court may, in its discretion, order the expansion of the record pursuant to Rule 7, to include "additional materials relevant to the determination of the merits of the petition." R. Governing Section 2254 Cases 7(a); *see also Ford v. Seabold*, 841 F.2d 677, 691 (6th Cir. 1988)(noting that expansion of the record pursuant to Rule 7 within the sound discretion of the district court). Expansion of the record in this case would avert the need for an evidentiary hearing as all evidence Richey proffers has been obtained through either depositions or affidavits.

Courts have eschewed holding evidentiary hearings in cases where, as here, the evidence presented does not involve issues of credibility. Noting that "a court may employ a variety of measures in an effort to avoid the need for an evidentiary hearing," the Supreme Court determined in *Blackledge v. Allison*, 431 U.S. 63, 81 (1977), that a habeas court properly denied the petitioner's evidentiary hearing motion. Following this precedent, the Seventh Circuit determined that a capital habeas corpus petitioner was not

entitled to an evidentiary hearing to assert a jury bias claim because counsel already had interviewed the juror and a transcript of that interview was submitted for court review. *Porter v. Gramley*, 112 F.3d 1308, 1318 (7th Cir. 1997). Enumerating the evidence that Rule 7 would permit a court to incorporate into the record, the *Porter* court reasoned that "the *Townsend* requirement of a hearing cannot be taken literally, since we know that the district court may employ a variety of measures in an effort to avoid the need for an evidentiary hearing on disputed facts." *Id.* at 1317 (citations and internal quotation marks omitted).

In the instant case, Richey maintains an evidentiary hearing is necessary to develop his actual innocence and ineffective assistance of counsel claims. Specifically, Richey desires the Court to hear the testimony of his newly acquired experts, Professor Richard Custer and Dr. Andrew Armstrong. Both of these experts have prepared reports, submitted affidavits, and were deposed by Respondent during discovery. Additionally, counsel took depositions from all experts who testified during Richey's trial, including DuBois, deposed several trial witnesses, and Richey's trial counsel.[1] Richey also has obtained affidavits from appellate counsel asserting their own ineffectiveness. Although Richey claims that this list is not exhaustive, Pet. Br. at 10, n.6, it remains Richey's burden to articulate the factual disputes on which the need for an evidentiary hearing arises.

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[1] Respondent has pledged to file the original deposition transcripts in its possession pursuant to Rule 7. Resp. Br. at 4, n.2. The Court need not await such action, however, as it may, *sua sponte*, expand the record to include such documents. R Governing Section 2254 Cases 7(a).

Finally, Richey cites to *Siripongs v. Calderon*, 35 F.3d 1308 (9th Cir. 1994), to support his assertion that a habeas court must grant an evidentiary hearing once the petitioner presents it with a cognizable claim for relief. What Richey overlooks, however, is that in *Siripongs*, the Ninth Circuit determined that a hearing is required for a habeas petitioner "who asserts a colorable claim to relief, and who has never been given the opportunity to develop a factual record on that claim..." *Id.* at 1310. Because Richey has been given extensive opportunities to develop the factual record, *Siripongs* is inapposite and a hearing is unnecessary.

Conclusion

For the foregoing reasons, Petitioner's Motion for an Evidentiary Hearing is denied. The Court will, on its own Motion, exercise its authority pursuant to Rule 7 and expand the record to include all discovery taken.

IT IS SO ORDERED.

/s/ Patricia A. Gaughan
PATRICIA A. GAUGHAN
UNITED STATES DISTRICT JUDGE

DATED: 3-27-00